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Supreme Court, U.S.
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(D)

No.

IN THE SUPREME COURT OF THE UNITED STATES

SHOZDIJIJI SHISINDAY, a/k/a DANNY DEAN THOMAS,

Petitioner,

v.

NATHANIEL QUARTERMAN

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Where a criminal defendant was involuntarily medicated throughout his initial trial in violation of *Riggins* v. *Nevada*, 504 U.S. 127 (1992), and thus was not able to confront a critical witness against him, and where the State read that witness's testimony into the record at defendant's re-trial; was it appropriate for the reviewing courts to apply harmless error analysis to deny the defendant's claim that the use of this testimony violated his rights under *Riggins* and his right to confront adverse witnesses?

2. Was it constitutional error for the trial court to deliberately misinform the jury, which was deciding whether petitioner would receive a death sentence, about the number of jurors required to agree on a sentence of life in order for a life sentence to be imposed, due to the statutory ban in article 37.0711(i) of the Texas Code of Criminal Procedure[1]?

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[1] TEX. CODE CRIM. PROC. ANN. art. 37.0711 § (3)(i) (Vernon 2007)

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Petitioner ShozDijiji ShisInday a/k/a Danny Dean Thomas respectfully requests that a writ of certiorari issue to review the judgments of the Fifth Circuit Court of Appeals ("Fifth Circuit") entered on December 28, 2007 and February 6, 2008, denying his petition for a Certificate of Appealability ("COA") and motion for rehearing and thereby affirming his September 1998 conviction and sentence of death for capital murder.

OPINIONS BELOW

The opinion of the Fifth Circuit, denying Mr. ShisInday's petition for a COA, is reported at 511 F.3d 514 (5th Cir. 2007). (Reprinted at Appendix ("App.") A) The order of the Fifth Circuit denying Mr. ShisInday's timely motion for rehearing is dated February 6, 2008, appears on the court's docket sheet and is unpublished. (Reprinted at App. B) The opinion of the United States District Court for the Southern District of Texas denying Mr. ShisInday's habeas petition, *ShisInday* v. *Quarterman*, Civ. Action No. H-06-814, 2007 WL 776680 (S.D. Tex. Mar. 9, 2007), is unpublished. (Reprinted at App. C)

Two other opinions are relevant to the issues raised by this petition. *ShisInday* v. *Texas*, No. 73351 (Tex. Crim. App. Sept. 12, 2001), *cert. denied*, 535 U.S. 1112 (2002), is an unpublished opinion in which the

Texas Court of Criminal Appeals affirmed Mr. ShisInday's 1998 conviction and death sentence on direct appeal. (Reprinted at App. D) *Thomas* v. *Johnson*, Civ. Action No. H-95-5236 (S.D. Tex. July 2, 1997) (Black J.), is an unpublished opinion in which the United States District Court, Southern District of Texas, vacated Mr. ShisInday's 1982 conviction and death sentence because he was involuntarily medicated during his first trial in violation of *Riggins* v. *Nevada*, 504 U.S. 127 (1992). (Reprinted at App. E) The State's appeal from that decision was dismissed as untimely.

JURISDICTION

On December 20, 2007, the Fifth Circuit denied petitioner's application for a COA from the district court's denial of petitioner's application for habeas corpus. (App. A) By order filed February 6, 2008, the Fifth Circuit denied petitioner's timely motion for rehearing. (App. B) This petition is being timely filed within 90 days of that order.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (2006).

JURISDICTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, TEX. CODE CRIM. PROC. ANN. art. 37.0711 (Vernon 2007) ("TCCP") and 28 U.S.C. § 2254(d) (2004). (Reprinted at App. G)

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari so that the Court can review two federal questions that go to the fundamental fairness of petitioner's trial and death sentence for capital murder, and which also raise important issues of constitutional law that have been resolved in divergent ways by the lower courts. Petitioner first invoked federal jurisdiction in this case under 28 U.S.C. § 2254 (2004).

The first question raises an important issue about the application of the Court's decision in *Riggins* v. *Nevada*, 504 U.S. 127 (1992): specifically, whether the use of testimony given during a trial at which a defendant was involuntarily medicated in violation of *Riggins* can ever be harmless error. Throughout petitioner's first trial, petitioner was involuntarily medicated in violation of *Riggins* and as a result, was unable to confront the witnesses against him or to assist his counsel. At petitioner's re-trial, the trial court admitted into evidence, over petitioner's

objections, testimony from his first trial from a witness who had since died. *Riggins* holds that a *Riggins* violation is not subject to harmless error analysis. Despite that holding, the Fifth Circuit declined to grant a COA on this issue and summarily held that harmless error analysis should apply to the introduction of this testimony and that petitioner had not shown harm. (App. A at A-16 – A-17)

This question also raises the related issue of how to apply the distinction between trial error, which is subject to harmless error analysis, and structural error, which so infects the entire trial that harm need not be shown, to violations of the Confrontation Clause. *See Fulminante* v. *Arizona*, 499 U.S. 279 (1991). Petitioner contends that the Court's Confrontation Clause jurisprudence precludes a straightforward application of *Fulminante* to violations of the Confrontation Clause, and that harmless error analysis should not be applied to Confrontation Clause violations that involve a deprivation of the right to cross-examine adverse witnesses. *See Crawford* v. *Washington*, 541 U.S. 36, 50-60 (2004). The lower courts have struggled in applying the Court's harmless error jurisprudence to Confrontation Clause violations, and consequently, the law in this area is both confused and inconsistent. Petitioner's case presents the Court with an opportunity not only to correct a particular injustice, but to clarify this confused area of the law.

Petitioner's second question raises the issue of whether a State is entitled to direct its trial courts, by statute, to deliberately misinform jurors deciding

whether to impose a death sentence about the number of votes necessary to impose a sentence of life, rather than death. This is an issue that recurs repeatedly in Texas death penalty cases, as a result of a mistake made by the Texas legislature when drafting the relevant Texas statute.

In petitioner's case, the jury was deadlocked for several days on the issue of punishment, with three jurors holding out for a life sentence and one juror informing the trial court that he planned to hold out for "all eternity." Yet those jurors were entirely unaware that they had the ability to effect what they thought was the proper and just result in petitioner's case. TCCP art. 37.0711 §§ 3(d)-(f), as applicable to petitioner's case, compels the trial court to instruct a jury considering whether to impose the death penalty that, in order to impose a life sentence, ten of the twelve jurors must agree. (App. G at G-5 – G-6) This instruction is contrary to the powers actually accorded the jury under Texas law, which expressly provides that if even one juror holds out for a life sentence, and the jurors do not reach agreement, the defendant automatically receives a life sentence. *See Padgett* v. *State*, 717 S.W.2d 55, 58 (Tex. Crim. App. 1986) (en banc).

Petitioner contends that this procedure, both on its face and as applied in petitioner's case, violates due process and the Eighth Amendment, and is inconsistent with the principles enunciated by the Court in such decisions as *Romano* v. *Oklahoma*, 512 U.S. 1 (1994) and *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), which

emphasize the importance of providing juries in capital cases with accurate information concerning their role in sentencing, the importance of their deliberations, and the consequences of their decisions. The state court's rejection of petitioner's arguments to this effect was an "unreasonable application of clearly established federal law," as determined by this Court, under 28 U.S.C. § 2254(d)(1). The Fifth Circuit's reliance on *Jones* v. *United States,* 527 U.S. 373 (1999), as the basis for upholding the state court's conclusions was misplaced. *Jones* held that an instruction on the consequences of a jury deadlock was not required in that case, and need not be given "in every capital case." *Id.* at 382-383. But the Court in *Jones* explicitly left open the possibility that "the District Court's failure to instruct the jury as to the consequences of deadlock could give rise to an Eighth Amendment problem" if a jury was "affirmatively misled regarding its role in the sentencing process." *Id.* at 381-82 *citing Romano*, 512 U.S. at 9. That, petitioner contends, is precisely what happened in his case.

Prior Proceedings

Sylvia Harrison was murdered in July 1981. Petitioner was arrested for this crime shortly after it occurred and was indicted for capital murder in December 1981. Petitioner was first tried in March 1982, found guilty and sentenced to death. His conviction and sentence were affirmed by the Texas Court of Criminal Appeals. *See Thomas* v. *State*, 701 S.W.2d 653 (Tex. Crim. App. 1985). Petitioner's application for habeas corpus relief, which included a

claim that he was involuntarily medicated during his trial, was litigated in the Texas state courts for eleven years and finally denied in 1995. *See Ex Parte Thomas*, 906 S.W.2d 22 (Tex. Crim. App. 1995) (en banc), *cert. denied*, 518 U.S. 1021 (1996). Petitioner then filed an application for a writ of habeas corpus in federal court, and on July 2, 1997, the United States District Court, Southern District of Texas, granted petitioner's application and vacated his conviction, on the ground that he had been involuntarily medicated with anti-psychotic drugs during his trial, in violation of *Riggins*, 504 U.S. 127. (App. E)

Petitioner was retried and was convicted of capital murder on November 16, 1998 in the 180th District Criminal Court of Harris County. He was sentenced to death on November 22, 1998. Petitioner's conviction was affirmed by the Texas Court of Criminal Appeals on September 12, 2001. (App. D) Petitioner's application for a writ of habeas corpus in state court was denied by the Texas Court of Criminal Appeals on March 9, 2005. *Ex Parte Thomas*, No.15,153-07 (Tex. Crim. App. Mar. 9, 2005). (App. F) Petitioner then sought a writ of habeas corpus in federal court. His petition was denied by the United States District Court for the Southern District of Texas on March 9, 2007. (App. C) Petitioner's application for a COA from the District Court's denial of habeas relief was denied by the Fifth Circuit on December 20, 2007. (App. A)

The Effect of the Forced Medication on Petitioner During His First Trial

The record clearly establishes that, as a result of the medication administered to petitioner, he was sluggish and drooling, or fully asleep, throughout his first trial. Affidavits of defense counsel, presented to the district court in support of petitioner's original petition for habeas corpus, establish that he was in a "zombie-like" state (App. H at H-5) and "slept through much of the trial." (App. I at I-5) Indeed, one attorney said that in his twenty-three years as a defense attorney he had "never seen any defendant sleep as much at trial" as petitioner. *Id.* The District Court found that "[t]he medical testimony suggests that Petitioner's prescription could render a person sleepy or sluggish." (App. E at E-3) Petitioner's sleeping was also reported in the press. (App. J at J-1)

Even when not actually sleeping, petitioner's eyes were "glazed" and he "almost drooled." (App. K at K-1) Other witnesses described petitioner as "slumped over," looking "like a zombie," "unable to lift his head so that he could watch or observe the proceedings in the courtroom," (App. L at L-1 – L-2) and "in a stupor" (App. M at M-2).

The Gilliam Testimony

During petitioner's first trial, Ernest Gilliam was one of the State's key witnesses. Mr. Gilliam testified that petitioner had purchased, from him, the gun that the State contended was the murder weapon. (App. N) This fact was not established by any other evidence,

either at the first trial, or at petitioner's re-trial. The Gilliam testimony thus linked petitioner to the alleged murder weapon in a way that no other evidence did.

This testimony was even more important during petitioner's second trial, at which the State introduced testimony concerning DNA analysis performed on blood scrapings allegedly obtained from the murder weapon. 18 R.R. at 213, 222-24.[2] That DNA evidence, the State contended, demonstrated that blood from the victim was present on this gun, and the Gilliam testimony served as the State's principal way of linking petitioner to that gun. In fact, the Court of Criminal Appeals made specific reference to the DNA evidence and the gun in its abbreviated statement of facts in its 2001 Opinion. (App. D at D-6)

This evidence was therefore critical to the State's case. Mr. Gilliam, however, had died in the sixteen years between petitioner's first and second trials, and was thus unavailable to testify at the re-trial. The State, therefore, sought to read Mr. Gilliam's testimony from the first trial into the record at the second trial. (App. O at O-1). Petitioner objected, arguing that this testimony was obtained during a trial at which he was involuntarily medicated in violation of *Riggins*. (App. O at O-1 – O-6) The trial court overruled petitioner's objections, and permitted the Gilliam testimony to be read to the jury. (App. O at O-6)

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[2] All such references are to the trial transcripts of Mr. ShisInday's 1998 re-trial.

The Jury Deliberations

After the parties presented final arguments on the issue of punishment during petitioner's 1998 trial, the jury retired to deliberate at 12:30 p.m. on Thursday, November 19, 1998. 25 R.R. 60.

The following day, Friday, November 20, 1998, the jury, by note stamped 11:56 a.m., indicated that it was unable to agree on Special Issue No. 3. (App. P at P-1) Petitioner moved for a mistrial, but the trial court denied the motion, indicating that it would send the jury a note to "[p]lease continue your deliberations." *Id.*

A second note stamped 4:20 p.m. that same day indicated that the jury "remain[ed] at the same 9/3 vote," that the three and the nine had not changed from the day before, and insisted they would not change. (App. P at P-1) The note concluded, "[c]ontinued deliberations are futile." *Id.* Petitioner made his second motion for mistrial, which the trial court again denied. *Id.* The trial court instructed the jury, over petitioner's objection, that, "You are to continue deliberating." *Id.*

At 5:50 p.m. that same day, petitioner made a third motion for mistrial, which the trial court again denied. (App. P at P-3) Petitioner then requested that the trial court instruct the jury that if they "can't arrive at a unanimous verdict on the special issues concerning favoring death or a 10-person agreement on special issues favoring life that a mistrial must be declared and that the defendant would not be discharged, that the defendant would receive an automatic life sentence,"

and that "they are not to do violence to their own consciences." *Id.* The State objected to the requested instruction on the ground that it would violate TCCP Article 37.0711(3)(i). The trial court denied petitioner's request. (App. Q at Q-4).

At 5:50 p.m., still on Friday, November 20, the jury sent out its third note. This time, the jury stated that it was still deadlocked three to nine, and that "one of the jurors has made the statement he will hold out for all of eternity and the other two are holding firm." (App. P at P-2) Petitioner responded by moving, for a fourth time, for a mistrial, on the same grounds as before and in addition, because "at this point surely any change in any of the juror's [sic] position either for the Defense or against the Defense would violate their consciences." (App. Q at Q-5) The trial court denied the motion. *Id.*

On Saturday, November 21, the jury resumed its deliberations. *Id.* At 10:04 am, the jurors sent out a fourth note indicating that "the jury is now ten to two, ten votes for no and two votes for yes." (App. P at P-3) The defense understood that to mean "that would be ten votes for death and two votes for life" and, on that basis, renewed its motion for mistrial. That motion was denied. (App. Q at Q-6) At 5:55 pm, petitioner again moved for mistrial based on the notes sent out by the jury and the likely coercive effect of their being asked to continue to deliberate without instruction. (App. Q at Q-7) This motion was denied. *Id.*

On Sunday, November 22, 1998, petitioner renewed his motion for mistrial prior to the jury's rendering of a verdict at approximately 10:07 am. *Id.* This motion was denied, (App. Q at Q-8), and the sentence of death announced.

REASONS FOR GRANTING THE WRIT

I.

IT WAS IMPROPER FOR THE TRIAL COURT TO APPLY HARMLESS ERROR ANALYSIS AND PERMIT THE INTRODUCTION OF TESTIMONY OBTAINED AT A TRIAL DURING WHICH PETITIONER WAS FORCIBLY MEDICATED IN VIOLATION OF *RIGGINS* V. *NEVADA* AND DENIED HIS RIGHT TO CONFRONT A KEY WITNESS AGAINST HIM

The jury that found petitioner guilty of capital murder, and sentenced him to death, heard testimony against petitioner that was obtained at a trial during which he was forcibly medicated with powerful anti-psychotic drugs, in violation of the rights recognized by this Court's decision in *Riggins*. The Fifth Circuit, however, refused to grant a COA to consider whether the trial court and federal district court had erred by applying harmless error analysis to the introduction of

the unconfronted testimony of Ernest Gilliam. (App. A at A-17).

Applying the standard for harmless error in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), the Fifth Circuit held that the introduction of the Gilliam testimony at petitioner's second trial did not have a "substantial and injurious effect or influence in determining the jury's verdict" because the testimony was cumulative of other evidence presented at trial. (App. A at A-16).

Petitioner disagrees with both the legal and factual premises underlying this holding. First, petitioner submits that *Riggins* itself makes clear that *Riggins* errors are not subject to harmless error analysis. Second, even if the constitutional violation caused by the introduction of Gilliam's testimony at petitioner's second trial is treated as a confrontation clause violation rather than specifically as a *Riggins* violation, petitioner submits that this Court's recent decision in *Crawford* means that harmless error analysis should not apply to Confrontation Clause violations involving a violation of the right to cross-examine adverse witnesses. Third, petitioner submits that, even if harmless error analysis does apply, he suffered harm under the appropriate standard for assessing harm arising from Confrontation Clause violations under *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), and *Harrington* v. *California*, 395 U.S. 250 (1969).

i) Riggins violations are not subject to harmless error analysis

In *Riggins*, this Court held that a defendant who has been forcibly medicated at trial without specific showings of necessity and the lack of a less intrusive alternative to forcible medication, does not have to show harm from this constitutional violation. *Riggins*, 504 U.S. at 137. As the Court explained:

> Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril.

Id.

Indeed, the federal district court that granted petitioner's habeas application in 1997 specifically cited and followed *Riggins* in vacating his previous conviction. (App. E at E-2)

Other federal courts have similarly held. For example, in *Rickman* v. *Dutton*, 864 F. Supp. 686 (M.D. Tenn. 1994), the court held that because the "precise consequences of compelling [the defendant] to take mind-numbing drugs cannot be shown from a trial

transcript," the court was "foreclosed from conducting harmless error analysis." *Id.* at 714 (quoting *Riggins*).

Despite this Court's holding in *Riggins* and despite subsequent cases applying *Riggins*, the Fifth Circuit failed to engage in any serious analysis of petitioner's *Riggins* arguments. In a conclusory opinion, the court denied petitioner's application for a COA, holding that the introduction of Gilliam's testimony was trial error subject to harmless error analysis under *Brecht*, and finding the testimony harmless. (App. A at A-16 – A-17)

The Court's decision in *Riggins* makes clear that the trial error/ structural error distinction is not appropriate in cases involving involuntary medication of a defendant at his trial. In *Riggins* – which was decided only one year after the Court developed the trial error/ structural error distinction in *Fulminante* – the Court did not rely on this distinction in finding that harmless error analysis should not apply where forcible medication denied the defendant his confrontation rights. Rather than discuss whether Riggins had been medicated throughout his trial, the Court focused on the impact the medication had on Riggins' ability to participate in his own defense. 504 U.S. at 137.

Petitioner submits that it should not make any difference that the *Riggins* error here involved the improper reading of testimony adduced at one trial where petitioner was medicated, at a second trial during which he was not medicated. There is no indication in *Riggins* that the Court's holding was

limited to cases in which a defendant was forcibly medicated for an entire trial rather than parts of that trial. The Court's reasoning – that "guesses whether the outcome of the trial might have been different if Riggins' motion [to terminate the use of antipsychotic medication] had been granted would be purely speculative" – was not dependent on the fact that Riggins was forcibly medicated throughout his trial. *Riggins*, 504 U.S. at 137. Petitioner submits that *Riggins* thus establishes that harmless error analysis should not apply when a defendant has been forcibly medicated during any portion of his trial.

The *Riggins* violation that affected petitioner's second trial is equivalent to the violation that would have occurred if petitioner had been involuntarily medicated for only a portion of his trial – the portion during which Gilliam testified. During that portion of the trial, petitioner was deprived of all of the rights implicated in *Riggins*, including the right to confront this witness, the right to participate in the trial and the right to assist his counsel in the examination of the witness. Petitioner submits that his conviction and sentence should be reversed as a consequence of this error.

While courts have often applied harmless error analysis to the erroneous introduction of evidence, *see, e.g.*, *Neder* v. *U.S.*, 527 U.S. 1, 18 (1999); *Satterwhite* v. *Texas*, 486 U.S. 249, 257 (1988), we are unaware of any other instance where a court has applied harmless error analysis to the introduction of testimony obtained in violation of *Riggins*. Nor are we aware of any other

instance where a court has applied harmless error analysis to permit the introduction of testimony from a prior proceeding, where that entire prior proceeding was found tainted by an error not subject to harmless error analysis. If prosecutors can reintroduce testimony from a trial that involved a *Riggins* violation at a later trial, the protection that *Riggins* accords to mentally ill defendants will be seriously undermined.

ii) The Court should clarify whether Fulminante requires that Confrontation Clause violations be subject to harmless error analysis

The admission of the Gilliam testimony, petitioner submits, does not fit neatly into the division between "structural errors," that infect the whole proceeding, and are not subject to harmless error analysis because it is "impossible to gauge the error's effect," and "trial errors," which are subject to harmless error analysis.

Even if the introduction of Gilliam's testimony at petitioner's re-trial is regarded not as a *Riggins* violation, but as a violation of the Confrontation Clause, harmless error analysis should not apply. The application of the *Fulminante* trial error/structural error framework to Confrontation Clause violations raises difficulties that require this Court's clarification. These difficulties arise from the fact that *Fulminante* can be read as holding that structural defects arise only from constitutional violations that continue throughout an entire trial, and as establishing a rule of law that

the impact of all other kinds of constitutional errors is sufficiently quantifiable to justify the use of harmless error analysis. This approach is not appropriate for violations of the right of confrontation, because the impact of such violations is difficult to quantify even when they do not affect a trial from beginning to end. The Court's reluctance to apply this approach in *Riggins* itself – discussed above – is evidence of this difficulty.

Petitioner respectfully submits that *Crawford* requires reconsideration of the use of harmless error analysis in relation to the Confrontation Clause. The heart of the right of confrontation is the opportunity to cross-examine an adverse witness. *See Crawford*, 541 U.S. at 50 (the "principal evil" at which the Confrontation Clause was directed was the "use of *ex parte* examinations as evidence against the accused.") There are at least two ways in which Confrontation Clause violations are distinguishable from other constitutional protections. First, the confrontation of testimony involves an exchange in court whose outcome is unpredictable. Other constitutional violations may involve whether or not particular evidence should have been admitted, or whether arguments should have been presented in court. But they do not typically involve the additional issue of whether the defense had an opportunity to respond to that evidence. Second, as Justice Scalia wrote in his opinion for the Court in *Crawford*, the Confrontation Clause requires not only some evidence or indication that the testimony at issue is reliable, but one particular "indicium of reliability . . . the one the Constitution actually prescribes:

confrontation." *Crawford*, 541 U.S. at 69. Denying a criminal defendant the opportunity to cross-examine an adverse witness – as petitioner was denied here – is "alone . . . sufficient to make out a violation of the Sixth Amendment." *Id.* at 68.

Admitting unconfronted testimony is thus quite different from admitting a coerced confession – the constitutional violation in question in *Fulminante* – because the confession can be severed from the rest of the evidence. In the case of unconfronted testimony, the court cannot just look at the unconfronted testimony, but must ask what might have happened had the testimony been confronted. In petitioner's case, an effective cross-examination had the potential not only to undermine Gilliam's testimony that he had sold the murder weapon to petitioner, but also to raise doubts about the testimony of other witnesses who sought to link petitioner to the murder weapon. There is no way to reliably quantify or predict what would have happened had petitioner not been deprived of his right to confront and cross-examine this important witness. Thus, even where a confrontation clause violation does not continue throughout an entire trial, the admission of unconfronted testimony is not the kind of readily severable error that is ordinarily classified as trial error. For this reason, confrontation clause violations should not be subject to ordinary harmless error analysis.

Petitioner submits that this analysis is not only correct as a matter of common sense but is also constitutionally mandated. The Court's decision in

Crawford establishes that while the "ultimate goal" of the Confrontation Clause is to "ensure reliability of evidence," in service of this goal it "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61. *Crawford* thus makes clear that the role of confrontation in shaping the evidence ultimately considered by the jury is constitutionally protected. Just as courts cannot determine that testimony is reliable when it has not been subject to cross-examination, so they cannot determine, without cross-examination, what impact unconfronted testimony had on a trial overall.

When the Constitution requires that a particular procedure be followed, harmless error analysis is generally not applicable. *See U.S.* v. *Gonzales-Lopez*, 126 S. Ct. 2557, 2562 (2006) (violation of right to counsel not subject to harmless error analysis because right requires "not that a trial be fair, but that a particular guarantee of fairness be provided-to wit, that the accused be defended by the counsel he believes to be best."). This Court in *Crawford* said that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." 541 U.S. at 62. The right of confrontation thus involves a right that is not only a matter of ensuring the correct result at trial – it also is a reflection of the fundamental constitutional commitment to treating a criminal defendant as someone who can affect the course of his own trial by cross-examining the witness against him and "expos[ing] his accusation as a lie." *Id.* It is a

requirement that a particular guarantee of fairness be provided to a criminal defendant.

Petitioner submits that the Court's holding in *Van Arsdall*, that Confrontation Clause violations are generally subject to harmless error analysis, cannot be sustained in light of *Crawford*. The court in *Van Arsdall* held that the proper inquiry for Confrontation Clause violations was whether, "assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless." *Id.* at 684. But *Crawford* forbids courts from engaging in this kind of speculation about what the effect of cross-examination might have been. "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation," even though the ultimate goal of a judicial inquiry into reliability is the same as the goal of cross-examination. *Crawford,* 541 U.S. at 61. Even if a court applying harmless error analysis attempts to take into account the considerations it thinks cross-examination would have yielded, this is not a constitutionally sufficient replication of actual cross-examination. The Confrontation Clause reflects the judgment that "adversarial testing 'beats and bolts out the Truth much better.'" *Id.* at 62 (quoting M. Hale, History and Analysis of the Common Law of England 258 (1713)). The Constitution mandates a particular confrontation procedure – cross-examination – and judicial conjecture about the likely outcome of this procedure is not an adequate substitute.

The difficulty of determining the impact of

confrontation violations has led the lower courts to struggle in applying the trial error/structural error distinction in Confrontation Clause cases. Courts of appeals and state appellate courts have taken different approaches to applying the trial error/structural error framework to cases involving Confrontation Clause violations that do not affect the conduct of an entire trial. Some state supreme courts,[3] as well as the Ninth Circuit,[4] examine whether the defendant would have been in a position to affect the trial had the violation not occurred, and whether the particular confrontation right violated was fundamental, before deciding whether to apply harmless error analysis to a confrontation clause violation that affected only a portion of a trial.

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[3] *See State* v. *Garcia-Contreras*, 953 P.2d 536 (Ariz. 1998) (holding that defendants' exclusion from the entire jury selection process was structural error); *State* v. *Bird*, 43 P.3d 266 (Mont. 2002) (defendant's exclusion from in-chambers individual voir dire proceedings was structural error that undermined the integrity of the entire trial); *State* v. *Calderon*, 13 P.3d 871, 879 (Kan. 2000)(failure to provide a translator during closing arguments for a defendant who did not speak English was a violation of the confrontation clause that was not subject to harmless error analysis because defendant's demeanor and responses at all phases of trial have a powerful influence on the trier of fact).

[4] See *Rice* v. *Wood*, 77 F.3d 1138 (9th Cir. 1996) (applying harmless error analysis to exclusion of defendant from portion of trial when sentence was read because defendant had no active role to play at point); *Hegler* v. *Borg*, 50 F.3d 1472, 1477 (9th Cir. 1995) (applying harmless error analysis after concluding that "[b]ecause the purpose of the proceeding from which Hegler was excluded was to allow jurors to hear again testimony given at trial, the ability of Hegler to influence the process was negligible.")

In contrast, other courts, including the Fifth Circuit, have treated Confrontation Clause violations as automatically subject to harmless error analysis.[5]

In this case, petitioner's only opportunity to cross-examine Gilliam was during his first trial, when he was effectively absent due to the effects of powerful anti-psychotic drugs. At his second trial, sixteen years later, when petitioner was in a position to assess Gilliam's testimony, he was unable to cross-examine Gilliam. It is likely that, under the tests used by the Ninth Circuit and the Arizona and Montana Supreme Courts, petitioner's claim would not have been subject to harmless error analysis. This Court should grant certiorari to resolve the confusion that has arisen among lower courts on the question of the appropriate standard of review of Confrontation Clause violations that do not affect an entire trial, and clarify how the Court's decision in *Crawford* affects this question.

iii) Even if harmless error analysis applies, petitioner suffered harm under the appropriate standard for assessing harm in Confrontation Clause cases

The Fifth Circuit, adopting the reasoning of the Texas Court of Criminal Appeals, found that Gilliam's

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[5] *See, e.g., Kittelson* v. *Dretke*, 426 F.3d 306, 319 (5th Cir. 2005) ("Before a court may grant relief on the basis of a violation of the Confrontation Clause, the court must apply harmless error analysis."); *U.S.* v. *Stewart*, 93 F.3d 189 (5th Cir. 1996) (holding harmless error analysis always appropriate in the context of confrontation clause violations).

testimony that he had sold the gun that was used as the murder weapon to petitioner was cumulative. The Court of Criminal Appeals pointed to the facts that the gun was found in petitioner's car, that other witnesses testified that the gun belonged to petitioner, and that petitioner confessed to shooting the victim with that gun. (App. D at D-35)

The actual evidence tells a different and more complicated story. There was no evidence of petitioner's fingerprints on the gun, and no forensic evidence suggesting that it was petitioner who shot Ms. Harrison. 21 R.R. 25-26. The State's evidence about the distance from which the bullet was shot at Ms. Harrison was equivocal. 21 R.R. 42-43. The fact that the gun was found in petitioner's car is of little significance – the evidence showed that both petitioner and Mr. Peels (against whom all charges were dropped, after his family members testified against petitioner) were in petitioner's car the night that Sylvia Harrison was murdered. All other testimony linking petitioner to the gun was tainted by the personal connections of the witnesses to Mr. Peels.[6] This testimony was also inconclusive, in contrast to the testimony offered by

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[6] Three witnesses other than Gilliam provided testimony linking petitioner to the gun: Doyle Peels, Martha Tarver and Ronald McHenry. Doyle Peels is the younger brother of Zendal Peels, 15 R.R. 89, who defense counsel claimed was responsible for killing Sylvia Harrison, 15 R.R. 22, and who was not charged with any crime in connection with Ms. Harrison's death after members of his family agreed to testify at petitioner's trial. Martha Tarver lived in the Peels's house and was known to some people as Mrs. Peels. 15 R.R. 25-26. And McHenry was a friend of the Peels family. 15 R.R. 118

Gilliam.[7] Finally, petitioner's confession was extensively challenged before the jury, and petitioner argued that the "confession" was not reliable. In sum, there was a reason why the State chose to introduce this evidence, over objection, when it knew doing so would at the very least create a significant appeal issue. The introduction of this testimony against petitioner was not "harmless" under any conceivably applicable standard.

Moreover, the Fifth Circuit's approach to assessing harm is inconsistent with the decisions of this Court. First, the Fifth Circuit placed the burden of establishing harm on petitioner. (App. A at A-16) This is contrary to this Court's decision in *O'Neal* v. *McAninch*, 513 U.S. 432, 439 (1995), which held that "the risk of doubt" as to the harm caused by constitutional errors is "on the state" and that the burden is "on prosecutors to explain why [the] errors were harmless." (Stevens, J., concurring) (citations omitted)).

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[7] Ms. Tarver was the only witness, other than Mr. Gilliam, to identify the murder weapon as having belonged to petitioner. But she did not offer any basis for her former belief. 15 R.R. 65. Doyle Peels did not say that the murder weapon belonged to petitioner. His only testimony concerning the gun was that he had seen petitioner holding the gun on occasions when Zendal Peels was also present. 15 R.R. 92, 97-99, 100. Finally, like Doyle Peels, Ronald McHenry did not testify that petitioner owned the gun, and the only connection he made between petitioner and the gun was that he had seen petitioner hold the gun on one of the occasions referred to by Doyle Peels. 15 R.R. 119-120. McHenry also testified that Zendal Peels was present on that occasion. 15 R.R. 119.

The Fifth Circuit's casual approach to assessing the harm caused by Gilliam's testimony is particularly troubling in the context of a Confrontation Clause violation. In *Van Arsdall*, 475 U.S. at 684, the Court indicated that the way to assess harm in cases involving Confrontation Clause violations is to assume "that the damaging potential of the cross-examination [has been] fully realized" and inquire whether "a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt."[8] Assessing the effect of Gilliam's testimony required assuming that his testimony had been proved false under cross-examination, and assessing whether the other evidence establishing the same point was sufficiently powerful to do so in light of cross-examination that had already established that testimony to the same effect was false.

Courts of appeals have been uncertain how to reconcile *Van Arsdell* with the Court's holding in *Brecht*, 507 U.S. 619. In the Sixth Circuit, courts have held on federal habeas review both that Confrontation Clause violations must have had a substantial and injurious effect, *Stallings* v. *Bobby*, 464 F.3d 576, 580 (6th Cir. 2006), and that violations must have been harmless beyond a reasonable doubt, as established by overwhelming evidence of the defendant's guilt, *Latimer* v. *Burt*, 98 F. App'x 427, *4, (6th Cir. 2004).

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[8] For commentary on the appropriate standard of review under *Van Arsdell* by a leading Confrontation Clause expert, see posting of Professor Richard Friedman to The Confrontation Blog, http://confrontationright.blogspot.com/2007 02 01 archive.html (Feb. 16, 2007)

Some courts have conflated these two standards, holding that violations must have had a substantial and injurious effect, but that this required showing that the evidence of the defendant's guilt was overwhelming. *Hill* v. *Hofbauer*, 337 F.3d 706, 718 (2003). The Fifth Circuit has produced similarly divergent results. In *Arroyo* v. *Quarterman*, 222 F. App'x 425 (5th Cir. 2007), the court held that evidence of guilt had to be overwhelming before Confrontation Clause violations could be found harmless on habeas review. In *Horn* v. *Quarterman*, 508 F.3d 306, 322, n.24 (5th Cir. 2007), and in the present case, the court instead applied the "substantial and injurious effect" standard. In sum, the lower courts have not consistently reconciled *Van Arsdell* with *Brecht*, and this Court's intervention would be appropriate to clarify how the law in this area is to be applied.

II.

PETITIONER WAS DENIED HIS RIGHT TO A FAIR SENTENCING HEARING WHEN THE TRIAL COURT REFUSED TO INSTRUCT THE JURY THAT EACH JUROR HAD THE ABILITY TO EFFECT A LIFE SENTENCE

Petitioner contends that the statute under which he was sentenced to death, TCCP article 37.0711, is unconstitutional on its face and as applied in his case. The rejection of this claim by the state courts was an "unreasonable application of clearly established federal

law" as determined by this Court, under 28 U.S.C. §2254(d)(1) (2004). The Court should grant certiorari to consider this claim, which has arisen in two reported cases before the Fifth Circuit, two reported cases before the Texas Court of Criminal Appeals, and twenty-two reported cases in federal district courts in Texas,[9] and which goes to the integrity of the sentencing process used by the State of Texas to decide whether persons facing the death penalty shall live or die.

In Texas, the jury decides whether or not to sentence a defendant to death by answering "special issues." Article 37.0711, which applies to capital proceedings involving offenses occurring before September 1, 1991, provides that if certain special issues are decided in the affirmative, the jury must answer a final special issue that, if answered in the negative, results in the imposition of a death sentence upon the defendant. TCCP. art. 37.0711 §§ 3(b) and (g). (App. G at G-4 – G-6)

Article 37.0711 also requires the trial court to instruct the jury that it may not answer the final special issue, which ultimately determines whether the defendant will be sentenced to life or death, in favor of life unless ten or more jurors agree. *Id.* at § 3(f). (App. G at G-5 – G-6)

In addition, Part 3(g) of the statute provides that

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[9] A list of such cases is provided at Appendix R.

> [i]f the jury returns a negative finding on any issue submitted under Subsection (b) of this section or an affirmative finding on the issue submitted under Subsection (e) of this section or is unable to answer any issue submitted under Subsection (b) or (e) of this section, *the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life.* Art. 37.0711 § 3(g) (emphasis added). (App. G at G-6)

Thus, "a jury's inability to answer a punishment question in a capital murder case has the same sentencing effect as a negative answer." *See, e.g., Padgett*, 717 S.W.2d at 58.

Three possible outcomes are presented by the statute, (1) a unanimous "yes" on each issue, (2) a "no" on one or more issues, or (3) a hung jury, unable to decide "yes" or "no" on one or more issues. The version of the statute applicable to petitioner's case,[10] however,

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[10] TCCP article 37.0711 was enacted in 1993 by the Texas Legislature to extend consideration of an additional special issue for mitigating circumstances to capital cases in which the offense was committed before September 1, 1991. H. 73d Leg., ch. 781, § 2 (Tex. 1993). Subsection 3(i) of Article 37.0711 retained the prohibition on instructing jurors on the consequences of deadlock challenged here, whereas the Texas Legislature removed the prohibition from article 37.071 which applies to capital cases involving offenses occurring on or after September 1, 1991. Thus, a parallel sentencing procedure has been in place for Texas capital defendants since 1993. The prohibition contained in

contains the following part 3(i), which expressly forbids the jury from learning the result of the third outcome:

> The court, the attorney for the state, or the attorney for the defendant may not inform a juror or prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.

Art. 37.0711 § 3(i). (App. G at G-6) It is the prohibition of this part, 3(i), operating in conjunction with part 3(g), that is the subject of this constitutional challenge.

The jury instructions mandated by this statute necessarily lead jurors to believe that a concurrence of ten or more is needed to answer a special issue in a way that will result in a life sentence, when in fact, any one juror who believes that the prosecution has failed to meet its burden can effectively cause the imposition of a life sentence. *Cf. Johnson* v. *State*, 691 S.W.2d 619, 625 (Tex. Crim. App. 1984) (en banc), *cert. denied*, 474 U.S. 865 (1985) ("under the current Art. 37.071 [analogous to the later enacted Article 37.0711] a defendant in effect need only convince one juror to vote 'no' in order to get the minimum punishment"). The statute thus has the effect of misleading jurors in a substantial number of Texas capital cases, i.e. those involving offenses occurring on or before September 1, 1991, about their ability to effectuate the sentence they

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subsection 3(i) of Article 37.011 is applicable to defendants like petitioner, who are accused of committing offenses earlier than September 1, 1991. No such prohibition applies to defendants accused of committing offenses on or after September 1, 1991.

believe to be required by the evidence presented and their own evaluation of that evidence.

In petitioner's case, the impact of the statutory prohibition against informing the jury that the failure to achieve the required ten or twelve votes on any special issue would result in an automatic sentence of life was particularly manifest. The jury was, in fact, deadlocked on the issue of punishment, with several jurors holding out for life and one juror indicating that he would hold out for "all eternity." (App. P at P-2) In addition, the instructions the trial court gave to the jury in compliance with the sentencing statute did not even contemplate the possibility of a failure to agree by a vote of ten or twelve. (App. S) The trial court charged the jury that it must answer the special issues presented to it in either the affirmative or negative, but that it could not return an affirmative or negative finding unless the requisite number of votes for each option had been obtained. (App. S at S-3 – S-5)

In light of the trial court's charge, and the jury's total ignorance of the fact that contrary to the instructions of the court a sentence of life required only one vote, it is highly likely that the jurors who believed a life sentence to be the most appropriate sentence despaired of ever obtaining the ten votes they believed to be required for life and did not understand that, in fact, they did have the power to bring about the result they thought appropriate. Further, considering the trial court's directive that the jury answer each special issue by a vote of ten or twelve, and the court's repeated instructions to continue deliberating in the face of its

deadlock, it is likely that the holdout jurors believed that the jury was required to resolve its deadlock, even if that meant yielding to a majority opinion with which those jurors fundamentally disagreed.

Petitioner contends that misleading the jury about its role in the sentencing process, and leading jurors erroneously to believe that their votes will have no impact on the sentencing decision, violates due process and the Eighth Amendment, leads to arbitrary and capricious sentences, and is inconsistent with this Court's precedents. *See, e.g., Romano* 512 U.S. at 9 (a jury cannot be "affirmatively misled regarding its role in the sentencing process."); *Caldwell*, 472 U.S. at 342 (holding it constitutionally impermissible to mislead the jury "in a manner that diminishe[s] the jury's sense of responsibility") (O'Connor, J., concurring, *opinion held to be controlling in Romano*, 512 U.S. at 9).

The Texas Court of Criminal Appeals did not directly consider federal law on this point, but cited to its own, earlier decisions that unreasonably applied *Caldwell* to hold that art. 37.0711 was constitutional. (App. D at D-72) The Fifth Circuit and the Texas Court of Criminal Appeals have repeatedly held that the Court's holding in *Jones* v. *U.S.*, 527 U.S. 373, definitively disposes of the issue raised by petitioner. (App. R) However, petitioner contends that *Jones* does not preclude petitioner's argument, and that the Fifth Circuit should have at least granted a COA on this issue. *See Miller-El* v. *Cockrell*, 537 U.S. 322, 340 (2003).

Jones was a federal death penalty case in which the Court considered whether a court must instruct a jury considering the imposition of a death sentence as to the consequences of deadlock, and held that such an instruction was not required. 527 U.S. at 379-84. Petitioner submits that the issue presented here is different from the issue presented in *Jones,* in several critical respects:

First, the Texas statute, unlike the federal statute at issue in *Jones*, affirmatively misleads the jury by requiring the trial court to instruct the jury that a concurrence of ten jurors is required to sentence a defendant to life, when in fact, one juror alone has the power to effect a life sentence. This Court in *Jones* explicitly left open the possibility that the "failure to instruct the jury as to the consequences of deadlock could give rise to an Eighth Amendment problem" if a jury was "'affirmatively misled regarding its role in the sentencing process.'" *Id.* at 381-82 (quoting *Romano*, 512 U.S. at 9). This case presents just the problem the Court referred to in *Jones*.

Second, the petitioner in *Jones* argued that the Court should require the lower courts to instruct the jury, in every case, as to the consequences of a failure to agree. *Jones*, 527 U.S. at 380, 383. Here, petitioner is challenging a Texas statute which prohibits the trial court from *ever* instructing the jury as to the consequences of a failure to agree, in cases where the offense occurred on or before September 1, 1991. There is obviously a middle ground between the two positions – that while an instruction may not be required in

every case, it is inappropriate for a State to prohibit its trial courts from ever giving such an instruction, even where it is necessary to correct an obvious misimpression that would result in the arbitrary and capricious imposition of the death penalty in violation of due process, the Eighth Amendment and this Court's own precedent.

Third, the Texas statute, unlike the federal statute, appears to operate in the way it does by virtue of a mistake, not by design. The legislative history of the predecessor statute to the provision at issue, article 37.071 3(g), reveals that the changes wrought by the ban on juror consideration of the consequences of deadlock were not addressed or considered by the Legislature.

The two parts of article 37.0711 which are the subject of this constitutional challenge were first incorporated into the TCCP in 1981, the same year as the offense in this case, as House Bill 1164. Texas H.B. 1164, 67th Leg. (1981). Prior to 1981, the failure of the capital sentencing jury to agree resulted in a mistrial.[11] The stated legislative purpose of the amendment was to:

> prevent costly re-trials and as you all well know that we have mistrials and

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[11] Hearing on H.B. 1164 Before the Committee on Criminal Jurisprudence of the Texas House of Representatives, 67th Leg. (1981); *Eads* v. *State*, 598 S.W.2d 304 (Tex. Crim. App. 1980), *superseded by statute*, TCCP art. 37.071, *as recognized in Wallace* v. *State*, 618 S.W.2d 67,75 (Tex. Crim. App. 1981).

> have to have re-trials you often lose valuable witnesses and evidence . . . . This saves money for the county and the state. It also will avoid long tie-ups with courts and our crowded dockets. . . . I think it facilitates a better and more streamlined system of justice.[12]

Thus, the hearings of the legislative committees demonstrate that the declared purpose for the amendment was to prevent mistrials and costly retrials. There seems to have been no consideration of the "vote-of-ten" requirement and how the amendment would render it obsolete and the statute's required jury instructions misleading, no mention of the reasons for keeping from the jurors the outcome of their failure to agree, and no discussion of the amendment's effect on jury deliberations. It is hard to conceive of a reason why the legislators would not want jurors to know the effect of their vote. Indeed, article 37 of the TCCP has undergone significant modifications in the past two decades. While the ban on advising jurors of the consequences of a failure to agree has been eliminated for defendants whose alleged offenses were committed on or after September 1, 1991, the statutory ban in article 37.0711 (3)(i) remains in place for defendants like petitioner whose alleged offense was committed before that date.[13] There is no rational basis for this arbitrary distinction. Life or death decisions should

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[12] House Hearing at 4-5 (Statement of Representative Jones).

[13] *See supra* footnote 10.

not be the result of legislative oversight, particularly where the effect of the oversight misleads jurors as to their actual role in deciding whether or not to impose a sentence of death.

Finally, the facts of this case distinguish it from *Jones*. Unlike in *Jones*, where the petitioner was unable to show that any "confusion necessarily worked to his detriment," 527 U.S. at 393, we know that three, and later two, jurors in petitioner's case were holding out for a sentence of life for four days. It is likely that had these jurors known that they each had the power to effect a life sentence, at least one of them would have done so. But after four days of failing to convince the required number of their peers that a life sentence was warranted, and no understanding that a life sentence could be imposed without any additional votes, those jurors gave in to the majority in favor of death.

Petitioner also contends that the Court's concern, as expressed in *Jones*, that an instruction on the consequences of a deadlock might undermine the government's interest in "having the jury express the conscience of the community on the ultimate question of life or death," 527 U.S. at 382, by somehow impeding the quest for unanimity, would not be realized if it were to clarify that there were certain, narrowly prescribed circumstances in which an instruction on deadlock might be appropriate. Further, petitioner contends that while this concern is certainly important, this Court should clarify how courts should balance the desire for unanimity against the requirement that "capital sentencing decisions rest on the individualized

inquiry contemplated in Gregg." *McCleskey* v. *Kemp*, 481 U.S. 279, 303 (1987) (citing *Gregg* v. *Georgia*, 423 U.S. 153, 188 (1976).

In sum, petitioner submits that the Texas statute, both as written and as applied in his case, misled the jury in a way that is qualitatively different from the statute and situation at issue in *Jones*, and that it did so in a way that violated due process and deprived petitioner of the fair sentencing hearing required by the Eighth Amendment. Petitioner respectfully requests that the Court grant certiorari to review this important issue and decide whether it is appropriate for Texas to bar juries hearing death penalty cases from ever learning, even in an exceptional case, that each juror has the power to effect a life sentence.

CONCLUSION

For the foregoing reasons, petitioner requests that the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Dated: May 2, 2008

Respectfully submitted,

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APPENDICES

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Appendix A

Opinion of the United States Court of Appeals for the Fifth Circuit Dated December 20, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-70008

SHOZDIJIJI SHISINDAY,
aka Danny Dean Thomas.

Petitioner - Appellant

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent-Appellee

Appeal from the United States District Court for the
Southern District of Texas, Houston Division

Before JONES, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

Petitioner ShozDijiji ShisInday was convicted of capital murder in Texas and sentenced to death. He now seeks a certificate of appealability ("COA") from the district court's denial of habeas corpus relief on nine issues. Because ShisInday has failed to make a substantial showing of a denial of a constitutional right or otherwise meet the qualifications for his application, we deny his application for COA.

I.

A jury first convicted ShisInday of capital murder on March 17, 1982. The Court of Criminal Appeals provided the following detailed description of the murder largely taken from ShisInday's confession:

The evidence at the guilt/innocence phase of trial revealed that in July of 1981, ShisInday and his girlfriend, Phoebe, were staying at the home of James Peels, his two sons, fifteen-year old Doyle Peels and seventeen-year-old Zendal Peels, and Martha Ann Tarver. On July 17, ShisInday gave Doyle a ride in his 1969 black-and-white Cadillac to pick up Doyle's work schedule at K-Mart. ShisInday entered the store with Doyle and purchased some ammunition in the sporting goods department. Later that evening, ShisInday, accompanied by Zendal, drove Doyle and Ronald McHenry to the skating rink.

. . .

According to ShisInday's July 9th transcribed statement and testimony from other witnesses, ShisInday and Zendal went shopping at a Safeway store after dropping the boys off at the rink. As they were leaving the store, they spotted nineteen-year-old Sylvia Harrison who was having car trouble. They stopped to help her, and ShisInday determined that she needed a new fan belt. They drove her across the street to an auto parts store, purchased the belt, and put it on her car. Harrison asked ShisInday and Zendal to follow her down the street to her house to make sure her car did not overheat again. Once they arrived, ShisInday fixed a leak in her car's "heater hose." She offered them a beer and invited them into the house. They sat in her living room, drank beer, and smoked some marijuana.

According to ShisInday's statement to the police, Zendal unexpectedly hit Harrison in the side of the head with ShisInday's gun, which Zendal had concealed in a paper bag. They carried Harrison, unconscious, out to the car and shoved her down on the passenger-side floorboard. They also took several items from her house including her telephone and eye glasses. ShisInday drove away with Zendal sitting in the passenger seat. Harrison regained consciousness, kicked the steering wheel, and bit ShisInday's hand. ShisInday told Zendal to grab her, and Zendal hit her in the head again with the gun, knocking her out. She regained consciousness again, and Zendal repeatedly hit her in the head with his knife until she passed out. She came to once more and began repeating, "God help me." ShisInday got his gun, put it to the

side of her head, and shot her one time. They drove her to a bridge near the river and picked up some cinder blocks. They then drove to a more secluded bridge and parked under one of the support pillars. ShisInday looked around to see if anyone was nearby. Zendal removed Harrison's clothes and cut off her bra. After tying cinder blocks to Harrison's feet and neck with a rope, they dumped her in the San Jacinto River. ShisInday broke off a willow branch and brushed away their footprints as they returned to the car. They drove to a grocery store parking lot where they threw Harrison's clothes and other personal items in a dumpster. Then they went to a car wash and washed the outside and inside of the car, particularly the floorboard, which was covered in blood.

Opinion on Direct Appeal, at 2-4.

The District Court's opinion provides additional information about the crime and the procedural history of this case.

After disposing of Ms. Harrison's body, Zendal and ShisInday returned to the Peels' home between four and five a.m. Zendal Peels' father accused ShisInday and Zendal of being late because they were smoking pot. ShisInday explained that they had car trouble. ShisInday then went to sleep in a back bedroom with his girlfriend.

The Peels family soon discovered blood on the outside and inside of ShisInday's vehicle. ShisInday's girlfriend woke him up in the morning and confronted him about the blood. ShisInday

claimed that he ran over a dog, put it in his car, and mercifully killed the dog to end its suffering. ShisInday told the same story to the Peels family. When the Peels and ShisInday's girlfriend did not believe his story, ShisInday decided to leave. Before going, ShisInday threatened Zendal "[i]f I go down, you are going down with me because you are in this with me." Tr. Vol. 15 at 44.

ShisInday, who had a long history of mental problems, soon sought treatment at a psychiatric hospital claiming that others accused him of killing a person when he actually killed a dog. After talking to Zendal Peels, and going to Ms. Harrison's residence and finding that there had been a fire, the police arrested ShisInday at around 1:00 a.m. at the hospital. ShisInday initially repeated his dog story to the police, but he later confessed to killing Ms. Harrison. In 1982, a jury convicted ShisInday of capital murder and he received a death sentence. The state courts affirmed his conviction and sentence on state appellate and habeas review.

ShisInday sought federal habeas relief. On July 2, 1997, United States District Judge Norman Black issued a habeas writ because Texas involuntarily medicated ShisInday with antipsychotic drugs during trial without making a proper inquiry into his mental state. Texas filed a late notice of appeal. ShisInday filed a cross-appeal and moved to dismiss the State's untimely appeal. On October 16, 1997, the Fifth Circuit dismissed the appeal when Texas conceded that the notice of appeal was not timely and that the circuit court lacked jurisdiction. On October 24, 1997, an assistant attorney general

and ShisInday entered into a "stipulation of dismissal" agreeing that: (1) ShisInday would be released immediately; (2) Texas would not seek further review of the final judgment; and (3) ShisInday would not prosecute his cross appeal. The Fifth Circuit dismissed the cross appeal on November 4, 1997.

The guilt/innocence phase of ShisInday's second trial began on November 9, 1998. Unlike in his first trial, the jury charge allowed for ShisInday's conviction either as a party or as the principal actor in Ms. Harrison's murder. A jury again found ShisInday guilty of capital murder. After a separate punishment phase, the jury retired to consider Texas' special issue questions.[14] After sending out four notes

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[14] The special issues submitted pursuant to article 37.071 of the Texas Code of Criminal Procedure provided as follows:

> Special Issue No. 1
> Was the conduct of the defendant, Shozdijiji ShisInday also known as Danny Dean Thomas, that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Special Issue No. 2
> Is there a probability that the defendant, Shozdijiji ShisInday also known as Danny Dean Thomas, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> Special Issue No. 3
> Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to

suggesting that they were experiencing problems in reaching a verdict, the jury finally answered Texas' special issue questions in a manner requiring the imposition of a death sentence. ShisInday unsuccessfully sought state appellate and habeas relief from his conviction and sentence.

ShisInday v. Quarterman, 2007 U.S. Dist. LEXIS 17099, *6.8 (S.D. Tex. Mar. 9, 2007).

ShisInday filed a federal petition for a writ of habeas corpus raising numerous issues. Respondent Nathaniel Quarterman filed a motion for summary judgment. The district court granted Quarterman's summary judgment motion, denied ShisInday's petition and dismissed the case. The district court declined to certify any issues for appellate review.

ShisInday now seeks a certificate of appealability from this court raising nine issues.

II.

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warrant that a sentence of life imprisonment rather than a death sentence be imposed?

You are instructed that in answering this "Special Issue" that you shall answer the Issue "Yes" or "No."

You may not answer this Issue "No" unless you agree unanimously, and you may not answer this Issue "Yes" unless ten (10) or more of you agree to do so.

You shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

ShisInday filed the instant Section 2254 application for habeas relief after the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA). His application is therefore subject to the AEDPA. Lindh v. Murphy, 521 U.S. 320, 336 (1997). Under the AEDPA, a petitioner must obtain a COA before appealing the district court's denial of habeas relief. 28 U.S.C. § 2253(c)(2). "This is a jurisdictional prerequisite because the COA statute mandates that '[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. . . .'" Miller-El v. Cockrell, 123 S. Ct. 1029, 1039 (2003) (citing 28 U.S.C. §2253(c)(1)). "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." Id. (citing Slack v. McDaniel, 529 U.S. 473, 482 (2000); Hohn v. United States, 524 U.S. 236, 248 (1998)). A COA will be granted only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (citation and internal quotation marks omitted). Any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. Fuller v. Johnson, 114 F.3d 491, 495 (5th Cir. 1997).

The analysis "requires an overview of the claims in the habeas petition and a general assessment of their merits." Miller-El, 123 S.Ct. at 1039. The court must look to the district court's application of AEDPA to the petitioner's constitutional claims and determine whether the court's resolution was debatable among reasonable jurists. Id. "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." Id. Rather, "'[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. at 1040. (citing Slack v. McDaniel, 529 U.S. 473, 484). "[W]hen the denial of relief is based on procedural grounds (Slack two-prong test): the petitioner must show not only that 'jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right', but also that they 'would find it debatable whether the district court was correct in its procedural ruling'." Beazley v. Johnson, 242 F.3d 248, 263 (5th Cir. 2001).

III.

Exempt from Execution due to Long History of Mental Illness

ShisInday argues first that a certificate of appealability should issue on the question whether executing him violates Supreme Court precedent because of his long history of mental illness. Because ShisInday did not raise this claim in state court, the district court found the claim to be procedurally barred. The district court also rejected the claim on

the merits. The district court concluded that there is no precedent for excluding from execution a petitioner who has a history of mental illness and mental disorders, citing In re Neville, 440 F.3d 220, 221 (5th Cir. 2006)(finding that Atkins did not exempt mentally ill inmates from execution).

The nature of ShisInday's argument is not entirely clear. On the one hand he argues that the Supreme Court's exemptions from execution of the mentally retarded in Atkins v. Virginia, 536 U.S. 304 (2002), and of juveniles in Roper v. Simmons, 543 U.S. 551 (2005), are milestones along a path that leads to an exemption from execution for inmates who are mentally ill. However, he also relies heavily on Panetti v. Quarterman, 127 S. Ct. 2842 (2007), both to overcome the procedural bar and as a basis for granting a COA on this issue. Panetti raised a claim under Ford v. Wainwright, 477 U.S. 399, 410, 106 S.Ct. 2595, 91 L.Ed. 2d 335 (1986), that he was incompetent to be executed due to insanity. In Panetti, the Supreme Court held that the petitioner's claim was not procedurally barred under 28 U.S.C. § 2254 despite his failure to raise it in previous habeas applications because the claim was not ripe at that time. It also held that the state court failed to provide adequate procedures in response to his claim that he was incompetent to be executed. Finally, addressing the merits of the petitioner's incompetency claim, the Supreme Court rejected the Fifth Circuit's test for incompetency that treated "delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted."

To the extent ShisInday seeks an extension of Atkins and Roper to the mentally ill, that claim is procedurally barred for failure to present the issue to the state court. In addition, this circuit's precedent precludes that argument, unless the petitioner contends he is insane and therefore incompetent to be executed. In re Neville distinguished an inmate who is mentally ill from an inmate who is insane. "Twenty years ago, Ford v. Wainwright established that the Eighth Amendment prohibits the execution of the insane. 477 U.S. 399, 410, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986). Neville, however, does not assert that he is insane." 440 F.3d at 221 n.1. Similarly, ShisInday does not claim that he is insane.

To the extent ShisInday argues that he is insane and therefore incompetent to be executed, that claim is not yet ripe, nor has it been exhausted. The setting of an execution date, which causes a Ford-based incompetency claim to become ripe, has not occurred in this case. Panetti, 127 S.Ct. at 2852; Stewart v. Martinez-Villareal, 523 U.S. 637, 643 (U.S. 1998). In addition, ShisInday has not presented this claim to the state court.

ShisInday has not demonstrated that he is entitled to COA on this claim.

IV.

Coerced Confession

ShisInday argues that a certificate of appealability should issue on the question whether

the state court erred in determining that his confession was not the result of police coercion. The state court found that ShisInday voluntarily and knowingly confessed without threats or coercion. The district court found that ShisInday had not met his AEDPA burden to rebut the presumptive correctiveness of the finding that the police did not coerce his confession.

ShisInday's principal argument in support of his application for COA on this issue is that the district court applied the wrong legal standard to reject his claim. He argues that the district court treated the issue as an issue of fact, rather than as a legal question meriting independent consideration, citing Miller v. Fenton, 474 U.S. 104 (1985). ShisInday is correct that the voluntariness of a confession is matter for independent federal determination and is ultimately a legal determination. Id. at 112. However, "subsidiary factual questions . . are entitled to the § 2254(d) presumption." Id. In Miller, the Supreme Court held that

> [S]ubsidiary questions, such as the length and circumstances of the interrogation, the defendant's prior experience with the legal process, and familiarity with the Miranda warnings, often require the resolution of conflicting testimony of police and defendant. The law is therefore clear that state-court findings on such matters are conclusive on the habeas

> court if fairly supported in the record and if the other circumstances enumerated in § 2254(d) are inapplicable. But once such underlying factual issues have been resolved, and the moment comes for determining whether, under the totality of the circumstances, the confession was obtained in a manner consistent with the Constitution, the state-court judge is not in an appreciably better position than the federal habeas court to make that determination.

Id. at 117. Contrary to ShisInday's assertion, the district court properly applied this standard.

The district court quotes the trial court as finding that

> (1) the police did not coercively abuse, threaten, or promise ShisInday anything in return for his confession; (2) ShisInday was lucid and could understand the nature of his confession; (3) ShisInday did not experience any delusion, hallucination, or effects of mental illness while confessing; (4) the police did not deprive ShisInday of food or sleep; and (5) ShisInday did not invoke his right to silence or request an attorney's assistance. Opinion on Direct Appeal, at 17.

These are all subsidiary factual questions under Miller that are subject to § 2254 deference. Miller, 474 U.S. at 112. ShisInday raised this argument at trial, on direct appeal and on state habeas review. The trial court held a suppression hearing and concluded that ShisInday's confession was properly obtained, a conclusion that has not been disturbed by several reviewing courts. The state court's factual findings are fairly supported by the record and ShisInday has not rebutted this presumptively correct finding by clear and convincing evidence as is required by 18 U.S.C. § 2254(e)(1). Reasonable jurists could not debate that the district court properly rejected this claim in full accord with constitutional standards, including the correct standard of review. COA is denied on this claim.

V.

Jury Instruction to Continue Deliberating

ShisInday argues next that COA should issue on the question whether the state court violated his constitutional right to due process by instructing the jury to continue deliberating after receiving repeated notes from the jury indicating they could not reach agreement without informing the jury of the effect of a hung jury. Petitioner has two complaints: the trial court's failure to instruct the jury that if they could not reach a verdict on the death penalty that a life sentence would be imposed and the trial court's instruction to the jury to continue to deliberate in response to notes from the jury that they were deadlocked.

Courts are given wide discretion in determining whether to declare a mistrial. In a habeas context, the petitioner must establish that under the totality of the circumstances the charge was so coercive as to have constitutionally rendered the petitioner's trial fundamentally unfair. Montova v. Scott, 65 F.3d 405, 409 (5th Cir. 1995). Based on our review of the record in this case, the instructions from the trial court were not coercive - they simply told the jury to continue to deliberate. Despite statements indicating that there was "little hope" of a unanimous verdict, later notes indicated that progress was being made. In addition, the jury continued to request evidence indicating that they were still deliberating. COA is not appropriate on this point. See United States v. Lindell, 881 F.2d 1313, 1321 (5th Cir. 1989).

ShisInday argues that the above circumstances coupled with the erroneous instruction to the jury that 10 votes were required for a life sentence make the instructions to continue to deliberate impermissibly coercive. In Jones v. United States, 527 U.S. 373 (1999), the Supreme Court held that an accused facing the death penalty is not entitled to an instruction as to the effect of a sentencing deadlock. ShisInday is not entitled to COA on this issue.

VI.

Admission of Testimony from First Trial

After his first trial, ShisInday was granted a retrial because the trial court had ordered

him medicated without making factual findings necessary to justify his medication as required by Riggins. Riggins v. Nevada, 504 U.S. 127 (1992). In ShisInday's second trial, the trial court allowed the admission of testimony from the first trial. The witness, Gilliam, was deceased at the time of the second trial. Gilliam's testimony was brief. He testified that he knew ShisInday and that he recognized State's Exhibit 10 as the .25 automatic pistol he owned and later sold to ShisInday for fifty dollars in July 1981. Gilliam testified on cross-examination that the gun had one clip when he sold it to ShisInday. ShisInday argues that admitting this testimony in his second trial violates Riggins and the confrontation clause because he has no means to refute it. He was medicated during the first trial when the witness testified. The witness was unavailable for cross-examination during his second trial.

The state court held that the testimony was cumulative and thus not a violation of ShisInday's confrontation rights. The federal district court ruled that even if the admission of the testimony violated the confrontation clause, the error did not have a substantial and injurious effect or influence in determining the jury's verdict.

ShisInday argues that when a petitioner establishes a Riggins violation, he need not prove prejudice or harm to obtain relief. We disagree. Under Brecht v. Abrahamson, federal habeas relief may not be granted for trial error that, although of constitutional magnitude, did not have a "substantial and injurious effect or influence in determining the

jury's verdict." 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)); see also, Hogue v. Johnson, 131 F.3d 466, 499 (5th Cir. 1997). Based on our review of the record, we agree with the Court of Criminal Appeals that the evidence was cumulative of other properly admitted evidence and thus its admission did not have a substantial and injurious effect on the verdict. As stated by the Court of Criminal Appeals,

> There was other evidence that linked ShisInday to the gun - the gun was found covered in blood in ShisInday's car, other witnesses testified that the gun used in the murder belonged to ShisInday, and ShisInday confessed to shooting the victim with that gun. We need not determine whether admission of Gilliam's testimony violated ShisInday's Sixth Amendment right to confront his witnesses because the testimony was cumulative and did not contribute to ShisInday's conviction.

Opinion on Direct Appeal, at 32. We agree and conclude that ShisInday is not entitled to a COA on this issue.

VII.

Estoppel

ShisInday argues that the district court erred in rejecting his estoppel claim in which he alleges that the prosecution should have been barred

from relying on a party theory in the second trial that the prosecution abandoned in his first trial. The state's theory in ShisInday's first trial was that he was the shooter. In the second trial, the state proceeded under the theory that if ShisInday was not the shooter, then he was at least a party to the crime. ShisInday argues that the prosecution abandoned the "party" theory in the first trial because the state dismissed the case against his co-defendant for insufficient evidence. He argues that the state should be estopped from relying on the party theory in the second trial. The Fifth Circuit has rejected judicial estoppel as a ground for habeas relief. Nichols v. Scott, 69 F.3d 1255, 1272 (5th Cir. 1995). ShisInday is not entitled to COA on this issue.

VIII.

Fourth Amendment Claims

In his sixth ground for COA, ShisInday argues that COA should issue on whether his Fourth Amendment claims were properly dismissed. ShisInday argued at trial that his arrest was unlawful. After the jury was sworn and jeopardy had attached, the trial court held a hearing on the issue and overruled the challenge. The district court dismissed the claim under Stone v. Powell, 428 U.S. 465 (1976). Stone bars habeas review of Fourth Amendment claims when the state has provided an opportunity for full and fair litigation of the claim. ShisInday argues that full and fair consideration of the merits of his Fourth Amendment claim was thwarted because of the timing of the hearing. He argues that because the hearing was held after the

jury was selected and jeopardy had attached, the trial court was put in the position of almost being required to overrule the motion. ShisInday's argument about the timing of the hearing does not alter the correctness of the district court's decision. He has not identified any law that requires a trial court to consider the admissibility of evidence before the jury is seated and sworn. The Fifth Circuit applies the bar as long as the state gives the defendant an opportunity to litigate the issue, whether or not the defendant takes advantage of the opportunity. Janecka v. Cockrell, 301 F.3d 316, 320-21 (5th Cir. 2002). ShisInday was given an opportunity to have his Fourth Amendment claims litigated. Therefore the Stone bar applies. He is not entitled to COA on this issue.

IX.

Compulsory Process Claim

ShisInday argues that a certificate of appealability should issue on whether it was a violation of his right to due process and compulsory process to allow the state to threaten his co-defendant, Zendal Peels, with prosecution if he were to testify and to allow Peels to assert his Fifth Amendment right after the state dismissed the case against him over 17 years ago. ShisInday wanted to call his co-defendant to testify and wanted him to assert his Fifth Amendment rights in front of the jury. The case against the co-defendant had been dismissed by the state for insufficient evidence after Peels' statement was ruled inadmissible against him. ShisInday claims that the prosecutor intimidated

Peels into invoking his Fifth Amendment rights to interfere with ShisInday's right to compulsory process, in violation of Brown v. Cain, 104 F.3d 744, 749 (5th Cir. 1997). However, because there is no statute of limitations on murder, the case against Peels could be reopened at any time. Peels had a reasonable fear of danger of prosecution and there is no Brown violation on these facts. ShisInday is not entitled to COA on this issue.

X.

Improper Argument

ShisInday's next argument is that the prosecutor engaged in improper argument when he argued in closing that ShisInday had raped the victim before her murder. During the trial, testimony had been admitted regarding the presence of semen in the victim's body, and other circumstances related to the condition of the victim's body giving the impression a rape had occurred. This evidence came in without objection. ShisInday objected to the prosecution's remarks in closing as being outside the evidence. ShisInday had originally been charged with rape and four members of the trial jury were in the courtroom when the rape charges were read before trial began. The rape charge was later dropped. ShisInday argues that the argument deprived him of due process and allowed him to be tried for a crime not contained in the indictment.

The state trial court found that ShisInday was procedurally barred from challenging the admission of the evidence because he did not

object at trial. The state habeas court agreed and also concluded that the testimony was admissible because it was relevant to establish a motive for killing the victim, burning her apartment and disposing of her body. The claim related to the prosecution's argument was also rejected on direct appeal and on state habeas review - first because the error was not preserved and alternatively because rape was a reasonable inference from the evidence and suggested a motive for the killing.

We agree with the state courts and the district court that ShisInday's claims as to the admission of the evidence are procedurally barred for failure to object at trial. We also agree with the state court that the prosecutor's argument is not a basis for relief. Although there was no direct evidence of rape before the jury, the district court properly found that rape was a reasonable inference from the evidence. COA is not appropriate on this issue.

XI.

Prolonged Stay on Death Row is Cruel and Unusual

ShisInday has been on death row for 25 years and argues that he is entitled to a COA on the issue of whether his prolonged stay on death row violates his right to be free from cruel and unusual punishment under the Eighth Amendment to the Constitution. There is no established law supporting this claim and clear Fifth Circuit precedent against it. Felder v. Johnson, 180 F.3d 206, 215 (5th Cir. 1999)(rejecting argument that executing petitioner after 20 years on death row was unconstitutional and

stating that the claim bordered on being legally frivolous.) ShisInday is not entitled to COA on this issue.

XII.

For the foregoing reasons, ShisInday's Application for Certificate of Appealability is DENIED.

A true copy
Attest:

Clerk, U.S. Court of Appeals,
Fifth Circuit

By J. Richy
Deputy
New Orleans, Lousiana

DEC 20 2007

Appendix B

Order of the United States Court of Appeals for the Fifth Circuit Dated February 6, 2008

U.S. COURT OF APPEALS
FILED
FEB 6 2008
Charles R. Fulbruge III, Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 07-70008

SHOZDIJIJI SHISINDAY also known as, Danny Dean Thomas

Petitioner – Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent – Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING

Before JONES, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

Appendix C

Memorandum and Order of the United States District Court, Southern District of Texas Dated March 9, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

SHOZDIJIJI SHISINDAY, a/k/a DANNY DEAN THOMAS, *Petitioner,*	§	CIVIL ACTION NO. H-06-814
v.	§	
NATHANIEL QUARTERMAN, *Respondent.*	§	

MEMORANDUM AND ORDER

On March 9, 2006, appointed counsel for Shozdijiji ShisInday ("ShisInday")[15] filed a federal petition for a writ of habeas corpus on his behalf.

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[15] ShisInday was convicted of capital murder and sentenced to death under the name Danny Dean Thomas. According to his amended petition, "ShozDijiji ShisInday took his name after his first conviction, after discovering his real birth father was native American. His birth name is Daniel Dean Derr, although he was later adopted and took the name Daniel Dean Thomas." (Docket Entry No. 18 at 2 n.3). This Court will refer to the petitioner as ShisInday. Throughout the record, ShisInday's name is sometimes spelled with a capital "I" and other times not. For consistency's sake, this Court will use his chosen spelling and silently alter any different rendering of his name.

(Docket Entry No. 1). Counsel later filed an amended petition. (Docket Entry No. 18). This action comes before the Court on Respondent Nathaniel Quarterman's answer and motion for summary judgment. (Docket Entry No. 21). ShisInday has responded to the answer, both through counsel and in a *pro se* pleading. After reviewing the pleadings, the record, and the applicable law – particularly the application of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") – the Court **GRANTS** Respondent's summary judgment motion, **DENIES** ShisInday's petition, and **DISMISSES** this case. The Court will not certify any issue for appellate review.

FACTUAL AND PROCEDURAL BACKGROUND

A jury first convicted ShisInday of capital murder on March 17, 1982. The Court of Criminal Appeals has provided a detailed description of the murder largely taken from ShisInday's confession:

> The evidence at the guilt/innocence phase of trial revealed that in July of 1981, ShisInday and his girlfriend, Phoebe, were staying at the home of James Peels, his two sons, fifteen-year old Doyle Peels and seventeen-year-old Zendal Peels, and Martha Ann Tarver. On July 17, ShisInday gave Doyle a ride in his 1969 black-and-white Cadillac to pick up Doyle's work schedule at K-Mart. ShisInday entered the store with Doyle and purchased some ammunition in the

sporting goods department. Later that evening, ShisInday, accompanied by Zendal, drove Doyle and Ronald McHenry to the skating rink.

. . .

According to ShisInday's July 9th transcribed statement and testimony from other witnesses, ShisInday and Zendal went shopping at a Safeway store after dropping the boys off at the rink. As they were leaving the store, they spotted nineteen-year-old Sylvia Harrison who was having car trouble. They stopped to help her, and ShisInday determined that she needed a new fan belt. They drove her across the street to an auto parts store, purchased the belt, and put it on her car. Harrison asked ShisInday and Zendal to follow her down the street to her house to make sure her car did not overheat again. Once they arrived, ShisInday fixed a leak in her car's "heater hose." She offered them a beer and invited them into the house. They sat in her living room, drank beer, and smoked some marijuana.

According to ShisInday's statement to the police, Zendal unexpectedly hit Harrison in the side of the head with ShisInday's gun, which Zendal had concealed in a paper bag. They carried Harrison,

unconscious, out to the car and shoved her down on the passenger-side floorboard. They also took several items from her house including her telephone and eye glasses. ShisInday drove away with Zendal sitting in the passenger seat. Harrison regained consciousness, kicked the steering wheel, and bit ShisInday's hand. ShisInday told Zendal to grab her, and Zendal hit her in the head again with the gun, knocking her out. She regained consciousness again, and Zendal repeatedly hit her in the head with his knife until she passed out. She came to once more and began repeating, "God help me." ShisInday got his gun, put it to the side of her head, and shot her one time. They drove her to a bridge near the river and picked up some cinder blocks. They then drove to a more secluded bridge and parked under one of the support pillars. ShisInday looked around to see if anyone was nearby. Zendal removed Harrison's clothes and cut off her bra. After tying cinder blocks to Harrison's feet and neck with a rope, they dumped her in the San Jacinto River. ShisInday broke off a willow branch and brushed away their footprints as they returned to the car. They drove to a grocery store parking lot where they threw Harrison's clothes and other personal items in a dumpster. Then they went to a car wash and washed the outside and inside of the car, particularly

> the floorboard, which was covered in blood.

Opinion on Direct Appeal, at 2-4.[16]

After disposing of Ms. Harrison's body, Zendal and ShisInday returned to the Peels' home between four and five a.m. Zendal Peels' father accused ShisInday and Zendal of being late because they were smoking pot. ShisInday explained that they had car trouble. ShisInday then went to sleep in a back bedroom with his girlfriend.

The Peels family soon discovered blood on the outside and inside of ShisInday's vehicle. ShisInday's girlfriend woke him up in the morning and confronted him about the blood. ShisInday claimed that he ran over a dog, put it in his car, and mercifully killed the dog to end its suffering. ShisInday told the same story to the Peels family. When the Peels and ShisInday's girlfriend did not believe his story, ShisInday decided to leave. Before going, ShisInday threatened Zendal "[i]f I go down, you are going down with me because you are in this with me." Tr. Vol. 15 at 44.

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[16] The state court records consist of a transcript that contains pretrial motions, trial court orders, jury instructions, and other pleadings, cited as "Trans. ___ at"; a 37-volume Statement of Facts, including hearings on pretrial motions, jury voir dire, the guilt/innocence phase, and the penalty phase, cited as "Tr. Vol. ___ at"; and a transcript of the state habeas proceedings, cited as "State Habeas Record at ___." The Court will cite to the Court of Criminal Appeals' judgment on direct appeal as "Opinion on Direct Appeal, at ___."

ShisInday, who had a long history of mental problems, soon sought treatment at a psychiatric hospital claiming that others accused him of killing a person when he actually killed a dog. After talking to Zendal Peels, and going to Ms. Harrison's residence and finding that there had been a fire, the police arrested ShisInday at around 1:00 a.m. at the hospital. ShisInday initially repeated his dog story to the police, but he later confessed to killing Ms. Harrison. In 1982, a jury convicted ShisInday of capital murder and he received a death sentence. The state courts affirmed his conviction and sentence on state appellate and habeas review.

ShisInday sought federal habeas relief. On July 2, 1997, United States District Judge Norman Black issued a habeas writ because Texas involuntarily medicated ShisInday with antipsychotic drugs during trial without making a proper inquiry into his mental state. Texas filed a late notice of appeal. ShisInday filed a cross-appeal and moved to dismiss the State's untimely appeal. On October 16, 1997, the Fifth Circuit dismissed the appeal when Texas conceded that the notice of appeal was not timely and that the circuit court lacked jurisdiction. On October 24, 1997, an assistant attorney general and ShisInday entered into a "stipulation of dismissal" agreeing that: (1) ShisInday would be released immediately; (2) Texas would not seek further review of the final judgment; and (3) ShisInday would not prosecute his cross appeal. The Fifth Circuit dismissed the cross appeal on November 4, 1997.

On November 5, 1997, the 180th Judicial District Court of Harris County issued a bench warrant for ShisInday's arrest. The bench warrant indicated that ShisInday's case was set for a December 8, 1997, docket call. On December 5, 1997, TDCJ transferred ShisInday to Harris County's custody.

The guilt/innocence phase of ShisInday's second trial began on November 9, 1998. Unlike in his first trial, the jury charge allowed for ShisInday's conviction either as a party or as the principal actor in Ms. Harrison's murder. A jury again found ShisInday guilty of capital murder. After a separate punishment phase, the jury retired to consider Texas' special issue questions.[17] After sending out four

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[17] The special issues submitted pursuant to article 37.071 of the Texas Code of Criminal Procedure provided as follows:

Special Issue No. 1

Was the conduct of the defendant, Shozdijiji ShisInday also known as Danny Dean Thomas, that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Special Issue No. 2

Is there a probability that the defendant, Shozdijiji ShisInday also known as Danny Dean Thomas, would commit criminal acts of violence that would constitute a continuing threat to society?

Special Issue No. 3

Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

notes suggesting that they were experiencing problems in reaching a verdict, the jury finally answered Texas' special issue questions in a manner requiring the imposition of a death sentence. ShisInday unsuccessfully sought state appellate and habeas relief from his conviction and sentence.

This Court appointed counsel to represent ShisInday throughout federal habeas review. ShisInday filed a lengthy petition raising the following grounds for relief:

1. The trial court's response to notes indicating that the jury could not reach a decision violated the due process clause.

2. The jurors impermissibly discussed ShisInday's potential parole eligibility during the punishment deliberations.

You are instructed that in answering this "Special Issue" that you shall answer the Issue "Yes" or "No."

You may not answer this Issue "No" unless you agree unanimously, and you may not answer this Issue "Yes" unless ten (10) or more of you agree to do so.

You shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

Trans. at 441-42.

3. Due process requires consideration of affidavits from jurors describing their deliberations.

4, The trial court violated the Confrontation Clause by allowing testimony from ShisInday's first trial to come before his second jury.

5. Recent Supreme Court precedent would not allow the presentation of testimony from ShisInday's first trial to be used in his second one.

6. The State of Texas violated the double jeopardy clause by maintaining custody of and retrying ShisInday.

7. The State of Texas' reliance on a prosecutorial theory that it had abandoned in the first trial unconstitutionally put ShisInday in jeopardy twice.

8. The doctrine of collateral estoppel should have prevented the State of Texas from prosecuting ShisInday as a party to the offense.

9. The State of Texas unconstitutionally arrested ShisInday without a warrant.

10. The trial court should have suppressed evidence recovered from ShisInday's vehicle.

11. The police used coercive tactics to secure ShisInday's confession.

12. ShisInday's jury should have decided whether probable cause supported his arrest.

13. The prosecution violated the Constitution by presenting evidence of an extraneous offense committed by ShisInday.

14. Trial counsel provided ineffective assistance by not requesting an instruction allowing the jury to find that drug use made ShisInday temporarily insane at the time of the offense.

15. The prosecution unconstitutionally threatened Zendal Peels with prosecution if he testified at ShisInday's second trial.

16. The prosecution engaged in misconduct by suggesting to the jury that ShisInday raped the victim.

17. Trial counsel provided ineffective assistance by failing to rebut the prosecution's allegations of rape.

18. The prosecution improperly questioned a witness about ShisInday's exercise of his right not to testify.

19. The trial court failed to grant a mistrial when a witness mentioned the exercise of ShisInday's constitution rights.

20. The trial violated ShisInday's constitutional rights by allowing the admission of evidence of prior convictions.

21. The state court unconstitutionally prevented ShisInday from representing himself on state habeas review.

22. The cumulative effect of the errors in this case requires habeas relief.

23. Appellate counsel violated ShisInday's rights by not advancing certain claims.

24. ShisInday's mental illness precludes his execution.

25. ShisInday's prolonged stay on death row constitutes cruel and unusual punishment.[18]

Respondent filed an answer to the habeas petition. (Docket Entry No. 21). ShisInday filed a reply, both through counsel and in a *pro se* pleading. (Docket Entry Nos. 27 and 31). ShisInday's petition is ripe for adjudication.

LEGAL STANDARDS

"The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *see also Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923) ("[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved."). "Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely." *Barefoot*, 463 U.S. at 887. Accordingly, federal habeas proceedings honor the "presumption of finality and legality [that] attaches to [a petitioner's] conviction and sentence." *Id.* at 887. Statutory and judicial policies, including the AEDPA, safeguard traditional limits on habeas review.

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[18] ShisInday's petition does not number his claims. This Court has divided his claims in a manner most conducive to orderly adjudication.

The AEDPA

The AEDPA provides for a deferential review of state court judgments. "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases and to further the principles of comity, finality, and federalism[.]" *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (quotation and citation omitted). The AEDPA forbids habeas relief on issues adjudicated on the merits in state court unless the state decision "was contrary to, or an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The Supreme Court has held that a state court decision is "contrary to" federal precedent if: (1) the state court's conclusion is "opposite to that reached by [the Supreme Court] on a question of law" or (2) "the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000); *see also Bell v. Cone*, 535 U.S. 685, 698 (2002); *Early v. Packer*, 537 U.S. 3, 7-8 (2002). A state court may unreasonably apply federal law if it "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the particular facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to

extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407.[19]

The AEDPA also affords significant deference to a state court's resolution of factual issues. Under 28 U.S.C. § 2254(d)(2) "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding[.]" *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). A federal habeas court must presume the underlying factual determinations of the state court to be correct, unless the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Miller-El*, 537 U.S. at 341.

Nevertheless, a petitioner's compliance with 28 U.S.C. § 2254(d) does not entitle him to habeas relief. No Supreme Court case "ha[s] suggested that a writ of habeas corpus should

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[19] A federal habeas court's review under 28 U.S.C. § 2254(d) "should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002). In reviewing the state court's substantive decision under the AEDPA, this Court focuses on "'determining the reasonableness of the state court's 'decision,' . . . not grading their papers.'" *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001) (quoting *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001)); *cf. Dillard v. Blackburn*, 780 F.2d 509, 513 (5th Cir. 1986) (observing that "federal courts do not sit as courts of appeal and error for state court convictions"). Accordingly, this Court bases its AEDPA examination on "the state court's ultimate conclusion, not on its reasoning." *DiLosa v. Cain*, 279 F.3d 259, 262 (5th Cir. 2002).

automatically issue if a prisoner satisfies the AEDPA standard[.]" *Horn v. Banks*, 536 U.S. 266, 272 (2002); *see also Robertson v. Cain*, 324 F.3d 297, 306 (5th Cir. 2003) (finding that 28 U.S.C. § 2254(d) "does not require federal habeas courts to grant relief reflexively"). Other judicial doctrines, such as the harmless-error doctrine and the non-retroactivity principle, bridle federal habeas relief. *See Thacker v. Dretke*, 396 F.3d 607, 612 n.2 (5th Cir. 2005). Any trial error cannot require habeas relief unless it "ha[d] a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Robertson*, 324 F.3d at 304 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993)); *see also Aleman v. Sternes*, 320 F.3d 687, 690-91 (7th Cir. 2003) ("Nothing in the AEDPA suggests that it is appropriate to issue writs of habeas corpus even though any error of federal law that may have occurred did not affect the outcome."). A habeas court likewise cannot grant relief if it would require the creation of new constitutional law. *See Horn*, 536 U.S. at 272 (relying on *Teague v. Lane*, 489 U.S. 288 (1989)).[20]

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[20] Federal habeas relief generally may not be premised on "a new rule" of law if the Supreme Court announced that rule after the petitioner's conviction became final, if the petitioner wishes to establish a wholly new rule, or if the petitioner seeks to apply a settled precedent in a novel way that would result in the creation of a new rule. *See Teague*, 489 U.S. at 310; *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) (finding *Teague* applicable in the capital context). "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government. . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301; *see also Graham v. Collins*, 506 U.S. 461, 467 (1993). As a general rule, "if the State . . . argue[s] that the defendant seeks the benefit

The Exhaustion and Procedural Bar Doctrines

Federal law erects procedural hurdles to habeas review, including the exhaustion and procedural bar doctrines. Section 2254 provides that habeas relief shall not be granted if the petitioner has failed to exhaust available state remedies. *See* 28 U.S.C. § 2254(b)(1).[21] Exhaustion requires that a petitioner fairly present his claims to the state courts before federal review becomes available. A petitioner satisfies the exhaustion requirement when he raises the substance of his federal habeas claim in the highest state court. "A federal court claim must be the 'substantial equivalent' of one presented to the state courts if it is to satisfy the 'fairly presented' requirement." *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) (quoting *Picard v. Connor*, 404 U.S. 270, 278 (1971)). While "[t]he habeas applicant need not spell out each syllable of the claim before the state court to satisfy the exhaustion requirement," *Whitehead*, 157 F.3d at 387, the exhaustion requirement "is not satisfied if a petitioner presents new legal theories or entirely new

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of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim . . . ." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994); *see also Horn*, 536 U.S. at 272 ("[A] federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state.").

[21] "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(6)(2). This Court, however, cannot grant relief under the AEDPA if a petitioner has failed to exhaust the available state court remedies. *See* 28 U.S.C. § 2254(b)(1)(A).

factual claims in his petition to the federal court." *Vela v. Estelle*, 708 F.2d 954, 958 (5th Cir. 1983) (footnote omitted); *see also Nobles*, 127 F.3d at 420; *Anderson v. Harless*, 459 U.S. 4, 6-7 (1982). Simply, the substance of the federal claim must be the same as the one presented in state court. *See Fisher v. Texas*, 169 F.3d 295, 302 (5th Cir. 1999); *Whitehead*, 157 F.3d at 387; *Burns v. Estelle*, 695 F.2d 847, 849 (5th Cir. 1983).

The procedural bar doctrine may also impede federal review of a petitioner's claims. "When a state court declines to hear a prisoner's federal claims because the prisoner failed to fulfill a state procedural requirement, federal habeas is generally barred if the state procedural rule is independent and adequate to support the judgment." *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001). A state procedural default, however, is not an insurmountable barrier to federal review. The Supreme Court has noted that

> [i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). "This doctrine ensures that federal courts give proper respect to state procedural rules." *Glover v. Cain*, 128 F.3d 900, 902 (5th Cir. 1997); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (finding the cause and prejudice standard to be "grounded in concerns of comity and federalism").

A petitioner's failure to exhaust his claims may also result in a federal procedural bar. *See Horsely v. Johnson*, 197 F.3d 134, 137 (5th Cir. 1999). "A procedural default . . . occurs when a prisoner fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.'" *Nobles*, 127 F.3d at 420 (quoting *Coleman*, 501 U.S. at 734 n.1). An inmate who files a petition containing unexhausted claims usually cannot return to state court because Texas' abuse-of-the-writ doctrine (codified at Tex. Code Crim. Pro. art. 11.071 § 5) generally prohibits the filing of successive state habeas applications. The Fifth Circuit has held that article 11.071 is an adequate state procedural bar, finding that Texas courts strictly and regularly enforce its standards. *See Barrientes v. Johnson*, 221 F.3d 741, 759 (5th Cir. 2000); *Muniz v. Johnson*, 132 F.3d 214, 221 (5th Cir. 1998). A petitioner may also overcome the procedural bar resulting from Texas' limitation on successive habeas applications by making a sufficient showing of cause and prejudice. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996); *Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir. 1999).

Summary Judgment

Respondent has moved for summary judgment. Summary judgment is proper where the record shows "no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). In ordinary civil cases, a district court considering a motion for summary judgment must construe disputed facts in a light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor").

However, a court must view a summary judgment motion through "the prism of the substantive evidentiary burden." *Id.* at 254. Congress, through the AEDPA, has constricted both the nature and availability of habeas review. This Court, therefore, applies general summary judgment standards only insofar as they do not conflict with the language and intent of the AEDPA or other habeas law. *See Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002) ("[Rule 56] applies only to the extent that it does not conflict with the habeas rules."), *overruled on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004); Rule 11 of the *Rules Governing Section 2254 Cases in the United States District Courts* ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a

proceeding under these rules."). Where the state courts have already resolved a prisoner's factual allegations by express or implicit findings, and the prisoner fails to prove by clear and convincing evidence that 28 U.S.C. § 2254(e)(1)'s presumption of correctness should not apply, construing facts in his favor is inappropriate and unauthorized.

ShisInday presented many of his claims in state court. The state courts issued detailed findings of fact and explicit conclusions of law with respect to each exhausted claim. Accordingly, the AEDPA guides this Court's summary judgment review. Where facts have been determined by the Texas state courts, this Court is bound unless ShisInday sufficiently refutes those findings.

ANALYSIS OF SHISINDAY'S CLAIMS

III. Improprieties in Jury Deliberation (claims 1-3).

ShisInday raises three claims involving what he considers improprieties that influenced the jury's deliberations. ShisInday alleges that the trial court coerced the jury into returning death-eligible answers to the special issues by not declaring a mistrial when the jury sent out notes that expressed discouragement in, or an inability to continue, the deliberative process (claim one). ShisInday also argues that, ignoring the trial court's explicit instructions, the jurors speculated on the parole eligibility accompanying a life sentence in Texas (claim two). Finally, ShisInday faults the state habeas court for applying the Texas Rules of Evidence to bar consideration of affidavits ShisInday

submitted to support his first two claims (claim three). The Court finds that ShisInday has not shown entitlement to habeas relief on these claims.

A. The Admissibility of Affidavits from Jurors (claim three)

Resolution of ShisInday's third claim – that the due process clause requires consideration of affidavits by jurors describing their deliberations – influences the viability of his first and second claims. On state habeas review, ShisInday supported his claims of impropriety in jury deliberation with affidavits from jurors who served at his trial. The substance of the affidavits discussed the impact that the trial court's instructions had on the sequestered jurors and also revealed that they discussed the parole implications of giving ShisInday a life sentence. The state court refused to consider the substance of the affidavits. Relying on Tex. R. Evid. 606(b),[22] the state habeas court found that the affidavits "constitute impermissible jury testimony relating to the validity of the verdict or attempting to

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[22] Tex. R. Evid. 606(b) provides as follows:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

impeach the verdict and do not qualify as permissible testimony concerning outside influences that affected the jury's decision or concerning a claim of juror disqualification." State Habeas Record at 2144, ¶ 163. The state court also found that Tex. R. Evid. 606(b) did not deprive litigants of any right under the United States or Texas Constitution. State Habeas Record at 2145, ¶¶ 167-68. ShisInday now contends that the state court's reliance on Rule 606(b) to bar consideration of the affidavits violates the federal due process clause. ShisInday also asks this Court to consider the substance of the affidavits in resolving his federal claims.

As an initial matter, ShisInday's claim involving the content of the jurors' affidavits does not raise an actionable ground for habeas relief. ShisInday's briefing on this issue does not challenge the integrity of his conviction or sentence. Nor does this claim show that ShisInday is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). ShisInday's challenge to the state habeas court's refusal to consider the challenged affidavits in adjudicating his habeas claims is collateral to his custody. "[A]lleged infirmities in state habeas proceedings are not grounds for federal habeas relief." *Brown v. Dretke*, 419 F.3d 365, 378 (5th Cir. 2005), *cert. denied*, U.S. ___, 126 S. Ct. 1434 (2006); *see also Elizalde v. Dretke*, 362 F.3d 323, 331 (5th Cir. 2004); *Beazley v. Johnson*, 242 F.3d 248, 271 (5th Cir. 2001); *Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999); *Duff-Smith v. Collins*, 973 F.2d 1175, 1182 (5th Cir. 1992).

The Court cannot order ShisInday's release from custody because the state habeas court did not consider certain evidence. Nevertheless, this claim seems to be a vehicle to breathe life into his otherwise-unsupported claims of improper jury deliberations. While the Court will consider his arguments in that context, the Court denies his third claim insofar as he intends it to be a separate constitutional issue.

On federal review, ShisInday relies on the affidavits already in the record. He also presents for the first time three new affidavits from jurors.[23] ShisInday argues that, the state court's holding notwithstanding, this Court should evaluate the statements the jurors made about their deliberations. Fed. R. Evid. 606(b), which is similar but not

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[23] For the first time on federal review, ShisInday provides affidavits from three jurors which replicate the allegations that he made in state court. Jurors Keith Barker, Berry Spencer, and Henry Joe Hopkins each submitted new affidavits on federal habeas review. (Docket Entry No. 1, Exhibit 4). Each of these affidavits attests that jurors discussed the issue of parole during deliberations. Respondent contends that the submission of these affidavits for the first time on federal review renders them unexhausted, and thus procedurally barred. While the Fifth Circuit has traditionally disfavored the expansion of the factual record beyond that presented to the state courts, *see Joyner v. King*, 786 F.2d 1317,1320 (5th Cir. 1986); *Brown v. Estelle*,701 F.2d 494, 495-96 (5th Cir. 1983), recent cases have shown a greater willingness to consider new evidence so long as it "merely supplements the petitioner's claims." *Morris v. Dretke*, 413 F.3d 484, 495 (5th Cir. 2005); *see also Conner v. Quarterman*, ___ F.3d ___, 2006 WL 210342, at *4-5 (5th Cir. Jan. 29, 2007). This Court, however, does not need to explore the nuances of the exhaustion doctrine with respect to this issue because Fed. R. Evid. 606(b) prevents consideration of the affidavits.

identical to the analogous Texas provision, restricts inquiry into a jury's deliberations.[24] Specifically, the federal rule states that "[a] juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying." Fed. R. Evid. 606(b). The Fifth Circuit has found that "both Fed. R. Evid. 606(b) and Tex. R. Evid. 606(b) bar all juror testimony concerning the jurors' subjective thought processes." *Salazar v. Dretke*, 419 F.3d 384, 402-03 (5th Cir. 2005), *cert. denied*, ___ U.S. ___, 126 S. Ct. 1467 (2006). The Fifth Circuit holds that no "Supreme Court precedent obligate[s] a state court to admit testimony from jurors concerning their internal discussions about parole law during deliberations." *Id.* at 399-400; *see also Parr v. Quarterman*, 472 F.3d 245, 256 (5th Cir. 2006). ShisInday does not show that his evidentiary material falls within any established exception to the federal rules. The state courts properly refused to consider the challenged affidavits; federal procedure likewise prevents

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[24] Fed. R. Evid. 606(b) states:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

reliance on those affidavits. This Court cannot consider the affidavits from former jurors about their deliberations in adjudicating ShisInday's habeas claims.

B. The Trial Court's Responses to Jury Notes (claim one)

ShisInday complains that the trial court coerced or improperly influenced the jury into answering the special issues in a manner resulting in a death sentence. The punishment phase of ShisInday's trial lasted from November 17 to November 19, 1998. The parties adduced testimony from 18 witnesses and introduced into evidence approximately 120 exhibits. The jury also had to reconsider significant testimony and evidence from the guilt/innocence phase in answering the special issue questions. The trial court's instructions informed the jury that, pursuant to Texas' "12-10" rule, they must either answer the special issues in the affirmative unanimously or in the negative with ten votes. Trans. at 421. Texas law did not allow the instructions to divulge that a hung jury would result in the imposition of a life sentence.

The jury deliberated ShisInday's punishment from November 19 to November 22. Throughout that period, the jury sent out notes that shed some light on the status of their deliberations. The jury retired to deliberate at 12:30 p.m. on November 19. At 1:43 p.m., the jury sent out a note requesting evidentiary material, including ShisInday's prison records, and additional legal pads. Trans. at 415. At around 5:45 p.m., the jury sent out

a note stating: "[w]e have not reached a conclusion. We believe it will be some time before we work this out – which we believe we will." Trans. at 416. The trial court sequestered the jury.

Jury deliberations began again on November 20 at around 8:30 a.m. At 10:06 a.m., the jury sent out a note requesting a list of all the evidence, as well as copies of ShisInday's psychiatric and school records. Trans. at 430. The jury note specified that the jurors wanted an exhibit list "to better define [their] requests." Trans. at 430. After around nine total hours of deliberations, the jury sent out a note at 11:45 a.m. indicating that it was unable to agree on Special Issue Number Three and "there seems little hope of any movement on individual juror's positions." Trans. at 431. The trial court did not immediately answer that note.

Later that afternoon, the trial court discussed the 11:45 a.m. note on the record:

The Court:	I have received a note stamped 11:56 a.m., this morning indicating that the jury is unable to agree on Special Issue No. 3. It is now 2:56 according to my watch. The jury has been, since the note was sent out, been to lunch and been on at least one break.
Trial Counsel:	And you are proposing to do what?
The Court:	I was going to send them a

note, "Please continue your deliberations."

Trial Counsel: For the record, we object to that and move for a mistrial. I think that any further deliberations will be unconscionable since the jury sent out a note saying after conscientious deliberation they can't resolve Issue No. 3. So, we move for a mistrial.

The Court. That is denied.

Tr. Vol. 26 at 3. The trial court wrote its response – "please continue your deliberations" – and returned the note to the jury. The record does not indicate at what time the trial court delivered that response, but it presumably occurred between the 2:56 p.m. hearing and the next jury note. At 3:45 p.m., the jury, apparently using a copy of the exhibit list, requested "State's Exhibits 102,103, 105, 106" which chronicled ShisInday's prior convictions. Trans. at 432.

At 4:20 p.m. the jury issued another note:

> [w]e the jury remain at the same 9-3 vote. The 3 haven't changed since yesterday, and they insist they will not change. The 9 haven't changed, and they insist they will not change. Continued deliberations are futile.

Trans. at 433. Ten minutes later, trial counsel moved again for a mistrial. Tr. Vol. 26 at 4. The trial court denied the mistrial motion and stated "For the record I will note that the jury sent out a note yesterday at the end of the day 5:45 and said they could resolve. We believe it will be some time before we work this out which we believe we will, which was the note yesterday afternoon. So I will deny your motion at this point." Tr. Vol. 26 at 4-5. Trial counsel objected to the trial court's repeated instruction to "please continue your deliberations." Tr. Vol. 26 at 5; Trans. at 433.

Half an hour later, the defense came back on the record with a new motion for a mistrial because of jury deadlock. Tr. Vol. 26 at 5-6. Trial counsel also requested an instruction that "if they can't arrive at a unanimous verdict on the special issues concerning favoring death or a 10-person agreement on special issues favoring life that a mistrial must be declared and that the defendant would not be discharged, that the defendant would receive an automatic life sentence." Tr. Vol. 26 at 6. The trial court denied the mistrial and the requested instruction. Tr. Vol. 26 at 6-7.

At 5:30 p.m., the jury requested a magic marker. Trans. at 435. Twenty minutes later they sent out a note stating: "We have 9 votes 'no' and 3 votes 'yes.' Of the 3 votes, 1 has repeated that he will not consider any change 'for all of eternity.' The other 2 are holding firm. Of the 9 'no' votes, all are firm." Trans. at 436.[25] Trial counsel again moved for

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[25] Here, the jury refers to their votes on the third, "mitigation" special issue. A "no" answer to the special issue authorizes the imposition of a death sentence.

a mistrial which the trial court again denied. The jury retired for the evening without receiving any response to their note.

Jury deliberations began again on Saturday, November 21 at 8:15 a.m. At 10:04 a.m., the jury issued the following note: "Our vote is 10 'no' and 2 'yes.' Of the 'yes' votes, one continues to insist that no argument or discussion will change his position. The 10 'no' votes are firm." Trans. at 437. The defense moved for a mistrial which the trial court denied. Tr. Vol. 27 at 3-4. The record contains no response to that jury note. At 5:55 p.m., the defense again moved for a mistrial. In denying the motion, the trial judge commented "the record should reflect that the last note I received from the jury was this morning at 10:00 o'clock and indicated that there had been some change since yesterday evening with respect to the vote in the jury room. Deny your motion." Tr. Vol. 27 at 5. The defense also unsuccessfully requested that the trial court deliver a supplemental instruction concerning the effect of jury deadlock. Tr. Vol. 27 at 5.

On Sunday, November 22, the jury began deliberating at 8:40 a.m. At 9:11 a.m., the jury sent out a note requesting State's exhibits and also asking which of ShisInday's hands the victim bit. Trans. at 439. The defense filed a written motion for mistrial at 9:25 a.m.: "Further deliberations would be coercive and there appears to be an acrimonious tone developing to the deliberations due to raised voices on at least one juror's part." Trans. at 440. At 9:45 a.m., the jury indicated that it had reached a unanimous verdict. Before the trial court read the

jury's answers to the special issues, trial counsel orally renewed the motion for a mistrial because

> the jury deliberations that have caused this verdict to come in have been lengthy and coercive upon the individual members of the jury. Jury members were told that they would not have to work on weekends or generally were spoken to in that proposition during voir dire and during their individual voir dire.
>
> We are now at least halfway through a weekend and we would move that any verdict reached at this point would be coercive and contrary to the general instruction that may have been given the jurors during their voir dire and would lead them to feel more compelled to render a verdict at this time than any other time.

Tr. Vol. 28 at 3-4. The trial court denied the motion. The trial court read the verdict and individually polled the jurors. The trial court then sentenced ShisInday to death.

On direct appeal, ShisInday claimed that the trial court erred in failing to grant the defense's eight motions for a mistrial. ShisInday argued that the trial court's initial response to jury notes, and then subsequent silence, coerced the jury into returning a verdict. ShisInday specifically relied on *Jenkins v. United States*, 380 U.S. 445 (1965), a case where the Supreme Court reversed a criminal

conviction when the trial court instructed a deadlocked jury "You have got to reach a decision in this case." *Id.* at 446. ShisInday argued that, like in *Jenkins*, the trial court's instruction improperly told the jury that they had to reach a verdict.

The Court of Criminal Appeals reviewed the record of jury notes and trial court responses and found that the trial court did not err in denying the mistrial motions. The Court of Criminal Appeals found that the initial jury note

> did not indicate that it was at an impasse but only that there was 'little hope.' The night before the jury had indicated that it believed that it could work it out, and that it had just requested more information before sending the note. So, there were significant indications that the jury was still deliberating.

With regard to the second note, the Court of Criminal Appeals found that

> The trial court is not constrained to enter a life sentence after the first sign of juror impasse, but may do so if in its discretion it determines that the jury has been together for such a time as to render improbable that they can agree. The jury had only been deliberating for a little more than a day, evaluating the testimony of over 35 witnesses and more than 120 exhibits. The trial court did not abuse its

> discretion in overruling the motion for mistrial.

The Court of Criminal Appeals also found that the jury continued to "show[] that it was making progress" the next day because "[i]n gaining one more 'no' vote, the jury did appear to be making deliberative progress." Finally, "[c]onsidering the length of the trial, number of exhibits, and notes from the jury indicating that they were continuing to deliberate, we hold that the trial court did not abuse its discretion in overruling ShisInday's motions for a mistrial." Opinion on Direct Appeal, at 60-62.

Again relying on the *Jenkins* case, ShisInday renewed his claim on state habeas review, this time focusing more on the propriety of the trial court's responses and using jury affidavits to show the pressure jurors felt. The state habeas court found that, since he had already raised the issue on direct appeal, the court could not consider ShisInday's expanded claim on habeas review. State Habeas Record at 2179, ¶ 104. In the alternative, the state habeas court concluded that "the trial court did not abuse its discretion and properly denied [ShisInday's] motions for mistrial, based on the length of trial, the amount of testimony, the number of exhibits, and the jury's notes indicating that the jury was continuing to deliberate." State Habeas Record at 2179, ¶ 105.

ShisInday again challenges the trial court's urging the jury to continue deliberations.[26]

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[26] ShisInday repeatedly calls the trial court's responses an "*Allen* charge." "The phrase 'Allen charge' refers to supplemental jury instructions that urge deadlocked juries to forego their differences

ShisInday argues that the trial court's response to the jury notes "transformed [the jury room] into a pressure cooker" and coerced deliberations to the point that he "received death from the judge, not the jury." (Docket Entry No. 18 at 20, 24). ShisInday points to several factors that infringed on the jury's untrammeled consideration of the evidence. ShisInday complains that the trial court's response to the first two jury notes – "please continue your deliberations" – informed the jury that it must return a verdict, as was found impermissible in the *Jenkins* case. Because the jury told the trial judge the exact number of votes in its notes, ShisInday also argues that the trial court's responses implied that the jury should deliberate until it returned a sentence allowing for his death. ShisInday contends that the trial court compounded the error by repeatedly delivering the same response, but then not answering the jury's last pleas.

To succeed on habeas review, ShisInday must show by clearly established Supreme Court precedent that the state courts improperly interpreted or applied federal law. ShisInday basis

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in order to reach a unanimous verdict. The original *Allen* charge urged the minority of the jury to consider the views of the majority in an effort to determine whether the minority views were reasonable under the circumstances." *Boyd v. Scott*, 45 F.3d 876, 878 (1994) (citing *Allen v. United States*, 164 U.S. 492, 501 (1896)). The state habeas court correctly found that, since the trial court's responses omitted the harsher instructions contained in true dynamite charges, "the trial court did not give a supplemental *Allen* charge in [ShisInday's] case; instead, the trial court instructed the jury to continue deliberating." State Habeas Record at 2144, ¶ 159.

his claim on *Jenkins v. United States*, 380 U.S. 445 (1965). ShisInday argues that the similarity between the instruction given in *Jenkins* ("You have got to reach a decision in this case") and that given in his case requires this Court to set aside his punishment. ShisInday argues that, like in *Jenkins*, the trial court's instructions informed the jury that "a mistrial was not acceptable, only a verdict wa-." (Docket Entry No. 18 at 22).

The Supreme Court has distinguished the application of *Jenkins* in habeas cases. The Supreme Court has noted that *Jenkins* is not relevant "to the § 2254(d)(1) determination, since [it does not] set forth a rule applicable to state-court proceedings. *Jenkins* . . . reversed [a] conviction[] based on jury instructions given in [a] federal prosecution[], and [did not] purport[] to interpret any provision of the Constitution." *Early*, 537 U.S. at 10. Since *Jenkins* involved the Supreme Court's supervisory power over federal criminal trials, *see Lowenfield v. Phelps*, 484 U.S. 231, 239 n.2 (1988), ShisInday's reliance on that case cannot command federal habeas relief.

The Supreme Court has elsewhere held that a court must look beyond the mere similarity between the instruction given by a trial court and that rejected in *Jenkins*, and instead "consider the supplemental charge given by the trial court 'in its context and under all the circumstances.'" *Lowenfield*, 484 U.S. at 237 (quoting *Jenkins*, 380 U.S. at 446). The state courts extensively reviewed the timing, content, and message of each jury note. In light of the circumstances surrounding the jury

deliberations, the state courts reasonably found that the trial court did not err in its instructions or in denying the mistrial motions.

"A judge may encourage jurors who are having difficulty reaching a verdict to deliberate longer, and to give due consideration and respect to the views of their peers." *United States v. Straach*, 987 F.2d 232, 242 (5th Cir. 1993) (citing *Allen v. United States*, 164 U.S. 492 (1896)). "It is not only permissible but proper for a trial judge to ask a jury to continue deliberating if it appears that further deliberation might be fruitful in helping the jury reach a unanimous verdict." *Coleman v. Quarterman*, 456 F.3d 537, 548 (5th Cir. 2006). The Court of Criminal Appeals found that the jury notes did not indicate a complete breakdown in deliberations and that, in fact, the jury was making progress. Even though the trial court did not respond to all the jury notes, the jury's repeated requests signaled that productive deliberations continued.[27]

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[27] ShisInday argues that the trial court's knowledge of the exact numerical division of jurors, in conjunction with the repeated insistence to keep deliberating, coerced the jury toward death. "The potential for coercion exists when a trial judge inquires as to the 'nature or extent of [the jury's] division' and then instructs the jury to continue deliberating." *Coleman*, 456 F.3d at 548 (quoting *Lowenfield*, 484 U.S. at 239-40). While in *Brasfield v. United States*, 272 U.S. 448 (1926), "the Supreme Court held that such an inquiry was *per se* reversible error on direct review of a federal criminal conviction, every court of appeals that has addressed the issue has held that *Brasfield's per se* rule does not apply in the habeas context." *Montoya v. Scott*, 65 F.3d 405, 412 (5th Cir. 1995); *see also Thompson v. Cain*, 161 F.3d 802, 810 (5th Cir. 1998) (denying habeas relief when "[t]he judge inquired [into the numerical division of jurors] simply to assess the progress of the jury" and no improper pressure was put on the jury). Here, the

ShisInday's jury faced a difficult task. The jury had to consider their answers to the special issues in the context of numerous exhibits and significant witness testimony. After the jurors' initial disclosure that they would need more time but could still reach a decision, the trial court was not unreasonable in expecting deliberations to continue through November 20 despite the jury's opinion that continued discussion would be futile. Rather than being a coercive intrusion into the independence of the jury's deliberations, the trial court's responses served as permissible words of encouragement. All the evidence on November 21 suggested movement in the jury's position and that productive consideration continued. After a little over an hour of deliberation on November 22, the jury returned a verdict. In the end, the state courts held that "[c]onsidering the length of the trial, number of exhibits, and notes from the jury indicating that they were continuing to deliberate . . . the trial court did not abuse its discretion in overruling ShisInday's motions for a mistrial." Opinion on Direct Appeal, at 62. ShisInday has not shown that this decision was

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trial judge did not ask about the numerical division of jurors nor comment on it in the responses. Even in the federal court's supervisory role over federal criminal convictions, the Fifth Circuit has "held that 'the unsolicited disclosure of the jury division by the foreman is not by itself a ground for a mistrial.'" *Coleman*, 456 F.3d at 548 (quoting *United States v. Warren*, 594 F.2d 1046, 1049 n.3 (5th Cir. 1979)). In this case, the jurors' disclosure of the status of their deliberations demonstrated that the deliberations continued. The fact that there was subsequent movement in the jurors' deliberations indicated that they had not reached an insurmountable barrier. The jury instruction did not unduly influence the direction of the jury's deliberations, but merely encouraged the jury to continue.

contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). The Court denies ShisInday's first ground for relief.

C. The Jury's Discussion of Parole Eligibility (claim two)

Consistent with then-applicable Texas law, the trial court instructed the jury "not to consider or discuss the possible actions of the Board of Pardons and Paroles or the governor, nor consider how long a defendant would be required to serve a sentence of life imprisonment, nor how the parole laws would be applied to this defendant." Trans. at 423.[28] ShisInday argues that the jury improperly discussed the possibility that he would be paroled if he received a life sentence. ShisInday points to various factors that he speculates that may have exposed the jury to information about his possible parole eligibility: the jurors made unsupervised visits to their homes before being sequestered; a local paper ran a story on the evening the jury was sequestered which mentioned that ShisInday could theoretically be instantly eligible for parole if given a life sentence; and during deliberations one juror, while accompanied by a sheriff's deputy, attended a funeral. The essence of ShisInday's claim, however,

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[28] "Traditionally, in Texas, parole is not a matter for a jury's consideration in a capital murder trial." *See Smith v. State*, 898 S.W.2d 838, 846 (Tex. Crim. App. 1995). Texas now allows a capital defendant to request a jury instruction regarding his parole eligibility. *See* Tex. Code Crim. Pro. art. 37.071(e)(2)(b) (Vernon 2002).

is that the jury actually discussed parole eligibility during deliberations.[29]

As previously discussed, the state habeas court refused to consider the substance of the affidavits ShisInday submitted to support his claim of improper jury deliberations. Because the omission of

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[29] On state habeas review, ShisInday supported this claim with an affidavit from Barry Brody Spencer, a juror who served at his trial. Mr. Spencer stated that

> Part of the instructions given to the jury by the Judge included the fact that we could not consider the fact that, if given a life sentence, the defendant could possibly receive parole at some point in time. Some of the jurors totally ignored these instructions and were very adamant that this defendant only receive the death sentence because they did not want him out on parole.

State Habeas Record at 554. ShisInday sought to bolster this account with an affidavit from his investigator, J.O. Yerby. Mr. Yerby's affidavit summarized notes he made from his interview with Henry Joe Hopkins, Jr., another juror who served at trial. According to Mr. Yerby, Mr. Hopkins stated that the judge's instruction not to discuss the parole implications was a "major problem," particularly because "[s]everal of the female jurors totally ignored the Judge's instructions and would not consider a life sentence because they were afraid that the defendant might get out of prison on parole." State Habeas Record at 557. Mr. Yerby recorded that Mr. Hopkins told him that the heated jury deliberations almost resulted in physical violence. State Habeas Record at 557. Aside from both the federal and state rules limiting consideration of affidavits detailing a jury's deliberative process, Mr. Yerby's affidavit almost entirely consists of hearsay for which ShisInday provides no exception to make its contents admissible. On federal habeas review, ShisInday provides an affidavit from Mr. Hopkins verifying Mr. Yerby's account of the jury deliberations, along with two new juror affidavits attesting that jurors inappropriately discussed parole.

that evidence left ShisInday without any support for his claim that the jury discussed parole, the state courts concluded that ShisInday "fails to show jury misconduct." State Habeas Record at 2180, ¶¶ 107-08. The state court's determination that no admissible evidence supported his habeas claim is an adjudication on the merits that requires federal deference under 28 U.S.C. § 2254(d)(1). *See Salazar*, 419 F.3d at 398. Habeas relief only becomes available if that holding was contrary to, or an unreasonable application of, federal law.

ShisInday presents no admissible evidence that the jury actually considered the operation of parole law during its deliberations. The Fifth Circuit has previously considered, and rejected, similar claims of jury misconduct that are based on an inadmissable evidentiary foundation. The Fifth Circuit has found that

> [n]o clearly established Supreme Court authority holds that a defendant is entitled to a new trial when one juror misstates the law of parole to other jurors during deliberations, nor does any Supreme Court precedent obligate a state court to admit testimony from jurors concerning their internal discussions about parole law during deliberations. In fact, the existing clearly established Supreme Court case law suggests the opposite.

Salazar, 419 F.3d at 399-400 (footnote omitted). Specifically, in *Tanner v. United States*, 483 U.S. 107, 120-21 (1987), the Supreme Court upheld limitations on the post-trial exploration of the jury's internal deliberations:

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

While ShisInday's petition alleges that some circumstances surrounding the jury may have made knowledge of his parole-eligibility accessible, he has not shown that the jurors had any contact with an outside influence that encouraged them to speculate on the influence of parole law. Instead, ShisInday's claim and the inadmissible affidavits he offers in support focus on the private, internal deliberations of the jury. The

state habeas court properly refused to consider the jury members' affidavits revealing the content of the deliberations.[30]

ShisInday has not shown that the state habeas court otherwise ran afoul of federal law in rejecting his jury misconduct claim. *See* 28 U.S.C. § 2254(d)(1). This Court denies ShisInday's parole-discussion claim.

IV. Presentation of Testimony from ShisInday's First Trial (claims 4 and 5).

ShisInday complains that the prosecution violated his Confrontation Clause rights by reading into the record the testimony of Ernest Gilliam, a witness from his first trial. Mr. Gilliam died before ShisInday's retrial.[31] Mr. Gilliam's brief testimony – consisting of four pages of the record – served only to show that Mr. Gilliam sold ShisInday a .25 caliber automatic pistol with which he presumably shot the victim. Tr. Vol. 18 at 98-101.

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[30] Even if ShisInday could show that the jury speculated on the operation of parole law, that alone does not necessarily require relief. Under Texas law "not every mention of parole during jury deliberations calls for reversal. Only jury misconduct that deprives the defendant of a fair and impartial trial warrants granting of a new trial." *De La Rosa v. Texas*, 743 F.2d 299, 304 (5th Cir. 1984) (citation omitted); *see also Parr*, 472 F.3d at 258. The brief view that the challenged affidavits give into the jury's deliberations only shows that they discussed parole. It is not clear that the affidavits prove that ShisInday received a fundamentally unfair trial.

[31] On October 5, 1998, the defense stated on the record that Gilliam was dead. Tr. Vol. 2 at 4. The prosecution had already informed the defense of his death. Tr. Vol. 4 at 8.

At the second trial, the defense objected to the introduction of Mr. Gilliam's testimony because ShisInday's forced medication prevented his active participation in cross-examination at the first trial. Tr. Vol. 18 at 92-93.[32] The defense also argued that, had he lived, Mr. Gilliam would have served as a mitigation witness for the defense. Tr. Vol. 18 at 93. The trial court allowed the prosecution to offer into evidence the portion of the trial record with Mr. Gilliam's testimony. Tr. Vol. 18 at 97. The two prosecutors then read Mr. Gilliam's testimony into the record. Tr. Vol. 18 at 98-101.

ShisInday argued on direct appeal that his forced medication at the first trial prevented him from confronting Mr. Gilliam or aiding in his cross-examination. The Court of Criminal Appeals did not address whether or not the introduction of Mr. Gilliam's testimony violated the Confrontation Clause. Instead, the Court of Criminal Appeals, in essence, found the testimony to be harmless:

> Gilliam's testimony, which is less than four pages long, revealed that he had sold the .25 caliber gun to ShisInday for $50. There was other evidence that linked ShisInday to the gun – the gun was found covered in blood in ShisInday's car, other witnesses testified that the gun used in the murder belonged to ShisInday, and

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[32] At the first trial, defense counsel only asked Mr. Gilliam one question. In response, Mr. Gilliam testified that the gun had one clip when he sold it to ShisInday. Tr. Vol. 18 at 101.

> ShisInday confessed to shooting the victim with that gun. We need not determine whether admission of Gilliam's testimony violated ShisInday's Sixth Amendment right to confront his witnesses because the testimony was cumulative and did not contribute to ShisInday's conviction.

Opinion on Direct Appeal, at 32.[33]

Respondent argues that the admission of Mr. Gilliam's testimony was harmless.[34] Federal

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[33] The Court of Criminal Appeals relied on Tex. R. App. Pro. 44.2 in denying this claim:

> If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

Respondent does not argue that the Court of Criminal Appeals' harmless-error analysis is subject to AEDPA deference; Respondent does not argue that the state-court decision was consistent with or a reasonable application of federal-harmless-error law. Because ShisInday cannot succeed on federal review unless the error were harmless even if he met the AEDPA standards, *see Robertson*, 324 F.3d at 304, this Court will focus on the undiluted federal harmless error standard from *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993).

[34] Respondent also argues that the Confrontation Clause did not prohibit the admission of Mr. Gilliam's testimony. In ShisInday's first federal hearing, the district court noted, in the context of an incompetency-to-be-executed claim, that the trial court found that ShisInday was competent at his first trial. Based on that finding, Respondent maintains that ShisInday had the full ability to exercise his Confrontation Clause rights. As the state decision

habeas relief is generally unavailable for harmless errors. *See Robertson*, 324 F.3d at 304. "Confrontation Clause errors [are] subject to . . . harmless-error analysis." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). Under *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993), a defendant must show that the error resulted in "actual prejudice." Actual prejudice is present if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). To determine whether Confrontation Clause error was harmless, the Fifth Circuit

> consider[s] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course, the overall strength of the prosecution's case.

United States v. Edwards, 303 F.3d 606, 623 (5th Cir. 2002) (quoting *Hafdahl v. Johnson*, 251 F.3d 528, 539-40 (5th Cir. 2001)).[35]

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focused on harmless error, this Court will likewise limit its discussion to that issue.

[35] ShisInday extensively cites to *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* held that out-of-court testimonial statements are *per se* inadmissible against a criminal defendant

ShisInday incorrectly argues that "Gilliam's testimony was the only evidence that tied the gun to ShisInday[.]" (Docket Entry No. 18 at 31). The police found the gun covered in blood on the driver's side in ShisInday's car. Three other trial witnesses testified that they saw ShisInday with the weapon. Martha Tarver (the girlfriend of Zendal Peels' father), Tr. Vol. 15 at 55-56; Doyle Peels, Tr. Vol. 15 at 97; and Doyle's friend Ronald McHenry, Tr. Vol. 15 at 119-20, each linked ShisInday to the murder weapon. ShisInday seeks to distinguish Mr. Gilliam's testimony from the other testimony associating him with the gun by arguing that he was the only witness who "was not biased" and "not related in any way to the parties." (Docket Entry No. 31 at 20). The same, however, can be said of Ronald McHenry who saw the gun in ShisInday's car the day of the murder and was not related to other witnesses. Tr. Vol. 15 at 119-20. Competent other testimony showed that ShisInday was the owner of the murder weapon and that he had it in his possession on the day of the murder.[36] Mr. Gilliam's testimony added

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unless the defendant has had a prior opportunity to cross examine the declarant. However, "*Crawford* does not apply retroactively on federal habeas." *In re Brown*, 457 F.3d 392, 395 (5th Cir. 2006) (relying on *Lave v. Dretke*, 444 F.3d 333, 334-36 (5th Cir. 2006)), *cert. denied*, ___ U.S. ___, 126 S. Ct. 1434 (2006); *see also Whorton v. Bockting*, ___ U.S. ___, S. Ct. ___, No. 05-595 (Feb. 28, 2007) (finding that *Crawford* does not apply retroactively). As ShisInday's direct appeal concluded before the Supreme Court handed down the *Crawford* opinion, this Court cannot apply its principles to ShisInday's claim. In any event, ShisInday had a full opportunity to cross-examine Mr. Gilliam in the first trial, though he now claims otherwise.

[36] ShisInday argues that Mr. Gilliam's "testimony was used to establish not only that ShisInday possessed a gun, but that in fact

nothing new to the jury's consideration of ShisInday's role in the murder.

Importantly, ShisInday offers no compelling area in which he could have cross-examined Mr. Gilliam differently than his attorneys did in the first trial. ShisInday makes no showing that deeper cross-examination of Mr. Gilliam in the second trial would have lessened the incriminating nature of his testimony. The Court finds that, even if the introduction of Mr. Gilliam's testimony violated the Confrontation Clause, that error did not have a substantial and injurious effect or influence in determining the jury's verdict.

V. Double Jeopardy and Collateral Estoppel (claims 6, 7, and 8).

ShisInday raises three claims which assert that his retrial after the initial round of federal habeas review violated the Constitution. First, ShisInday contends that Texas' failure to abide by all the terms of the stipulation it entered into during his first habeas proceedings created a situation where retying him unconstitutionally placed him twice in jeopardy, particularly since he had already served a lengthy sentence under his first conviction (claim

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purchased a gun, the same one identified as the alleged murder weapon." (Docket Entry No. 31 at 19-20). Whether ShisInday acquired his gun through purchase, gift, or some other means bore no material relationship to the charges against ShisInday. The value in Mr. Gilliam's testimony was in linking ShisInday to the weapon, not in establishing the manner in which ShisInday acquired the weapon.

six).[37] Second, ShisInday claims that the due process clause should have prevented the prosecution from relying on a theory it had abandoned in his first trial (claim seven). Third, ShisInday argues that collateral estoppel also should have barred the prosecution from relying on an abandoned theory (claim eight).

A. Double Jeopardy for Failing to Comply with the Stipulation (claim 6)

On July 2, 1997, the district court set aside ShisInday's conviction. The attorney general's office filed an untimely motion under Fed. R. Civ. P. 59(e). After the denial of the Rule 59(e) motion, the attorney general's office filed a notice of appeal believing that the post-judgment motion tolled the time to appeal. ShisInday filed a cross appeal. On October 21, 1997, the Fifth Circuit dismissed the attorney general's appeal as untimely. On October 24, 1997, ShisInday entered into a stipulation with the attorney general's office that provided for ShisInday's release in return for dismissal of the cross-appeal. The parties filed the stipulation with the Fifth Circuit on October 30, 1997. On November 4, 1997, the Fifth Circuit dismissed ShisInday's appeal.

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[37] The Court takes judicial notice of the record developed when ShisInday challenged the State's compliance with the stipulation in a federal civil rights lawsuit. *ShisInday v. Johnson*, H-97-CV-3894 (S.D. Tex.), *aff'd*, CA-99-21145 (5th Cir. Sep. 11, 2000). This Court's review of the facts surrounding the stipulation come from the current record and those developed in ShisInday's civil rights action.

ShisInday never entered free society. On October 30, 1997, the assistant attorney general who signed the stipulation contacted the chairman of the Texas State Classification Committee and told him not to release ShisInday from custody because of future trial proceedings in Harris County. On November 5, 1997, the 180th District Court of Harris County issued a bench warrant for ShisInday's arrest. The State of Texas transferred ShisInday to the Harris County Jail on December 5.[38]

In the state district court, ShisInday moved to set aside the indictment based on the due process clause. He complained that his retrial violated the double jeopardy clause because he engaged in a "quid pro quo" stipulation that guaranteed his release from custody. Tr. Vol. 4 at 15. ShisInday feared that he could not adequately defend himself against a retrial after serving such a long sentence. Tr. Vol. 4 at 17. The trial court summarily denied his ShisInday's objections to retrial.

On direct appeal, the Court of Criminal Appeals found that "[n]owhere does the stipulation bind the State of Texas from retrying ShisInday or prevent county authorities from taking ShisInday into custody. . . . Because ShisInday's conviction was not reversed on the basis of insufficient evidence, there was no legal impediment to the State's retrying

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[38] ShisInday filed a pre-trial state habeas application seeking to effectuate his release as a term of the stipulation. The Texas intermediate appellate court found the application moot after his retrial. *See ShisInday v. State*, 1998 WL 880958 (Tex. App. – Houston [14th Dist.] 1998, pet. ref'd).

ShisInday for the offense." Opinion on Direct Appeal, at 7-8. When ShisInday reasserted his double jeopardy claim on state habeas review, the state habeas court imposed Texas' procedural law to bar consideration of the merits anew, but in the alternative found that ShisInday's "re-trial was not barred by either double jeopardy or the Attorney General's stipulation of dismissal." State Habeas Record at 2152-53, ¶¶ 1-2.

Nothing in federal law prevented ShisInday's retrial after the dismissal of his federal habeas action. The Double Jeopardy Clause of the Fifth Amendment commands that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." The protection against double jeopardy is "clearly 'fundamental to the American scheme of justice.'" *Benton v. Maryland*, 395 U.S. 784, 796 (1969) (quoting *Green v. United States*, 355 U.S. 184, 187 (1969)). The Fifth Amendment guarantee against double jeopardy consists of "three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (footnote omitted). Nevertheless, "the Double Jeopardy Clause 'imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside[.]'" *Tibbs v. Florida*, 457 U.S. 31, 40 (1982) (quoting *Pearce*, 395 U.S. at 720); *see also Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003) ("[T]he touchstone for double-jeopardy protection in capital-

sentencing proceedings is whether there has been an 'acquittal.'"); *Shute v. State of Texas*, 117 F.3d 233, 238 (5th Cir. 1997) ("Generally, if a defendant obtains a reversal of his conviction, double jeopardy does not bar a retrial. If the conviction is reversed for insufficient evidence of guilt, however, double jeopardy does bar retrial. This is because a finding of insufficient evidence of guilt means that the trial court should have entered a judgment of acquittal, which would have barred retrial."). The only exception to this rule exists when "'the reviewing court has found the evidence legally insufficient' to support conviction." *Tibbs*, 457 U.S. at 40-41 (quoting *Burks v. United States*, 437 U.S. 1, 18 (1998)).

ShisInday seeks to create a new category of cases in which double jeopardy bars retrial when the prosecution fails to honor completely the terms of the dismissal of his first action. Simply, ShisInday sees the stipulation as a get-out-of-jail-free card which, while initially authorizing temporary release, has now become permanent. Nothing in Supreme Court jurisprudence authorizes the extension of double jeopardy principles in that manner.

ShisInday has already once litigated the question of the release from TDCJ custody in federal court, though in a different context. In 1997, ShisInday filed a civil rights action pursuant to 42 U.S.C. § 1983 based on the fact that he was transferred to Harris County custody, not released from custody, after the parties entered into the stipulation. *ShisInday v. Johnson*, No. 97-CV-3894

(S.D. Tex.). ShisInday asked the federal district court to enforce the parties' stipulation of dismissal or compensate him for the breach of that agreement. The federal district court dismissed that claim for a lack of subject matter jurisdiction. The Fifth Circuit Court of Appeals affirmed that holding on appeal. *ShisInday v. Johnson*, No. 99-21145 (5th Cir. Sep. 11, 2000) (unpublished).

In conjunction with its holding, the Fifth Circuit noted that "[i]t appears that ShisInday's continued confinement after November 4 (or even October 30) was not a constitutional violation in light of the impending bench warrant, even though [the Director of Texas Department of Criminal justice, Institutional Division] had previously signed the stipulation agreement providing for ShisInday's immediate release." *Id.* at 9. The Fifth Circuit held that

> particularly in light of [the chairman of the State Classification Committee's] knowledge that Harris County's impending warrant charged ShisInday with capital murder, it apparently would have been unreasonable to have released ShisInday so hastily. Once the Harris County warrant was issued, of course, [Texas] clearly was correct to keep ShisInday in custody until Harris County officials took him.

Id. at 10. The Fifth Circuit also explicitly found that "the stipulation of dismissal only prohibited the state

from seeking judicial review of the final order entered in ShisInday's federal habeas action, and therefore did not prohibit Harris County from seeking a new conviction." *Id.* at 11 n.8. The Fifth Circuit's reasoning applies with the same force in these proceedings.

Because the results of ShisInday's successful habeas action did not call into question the sufficiency of the evidence against him, the State of Texas was free to try him again for the victim's murder. Nothing in the stipulation itself or in federal law creates a double jeopardy exemption if the State transferred him to county custody without any immediate or intervening release. ShisInday has not shown that the state court's determination on this claim was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

B. Double Jeopardy and Collateral Estoppel Bar to Trial Theories Available to the Prosecution (claims 7 and 8)

During ShisInday's first trial the prosecution accused him of being the one who shot the victim. In his second trial, the prosecution proceeded under the theory that, if ShisInday was not the principal actor, he at least acted as a party.[39] ShisInday reasons that the prosecution "abandoned" that theory in his first prosecution so that its

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[39] Under Texas law, "[a] person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." Tex. Penal Code § 7.01(a).

emergence in the second trial violated principles of double jeopardy and collateral estoppel.

ShisInday raised this claim on state habeas review.[40] The state habeas court found that the "1981 indictment does not contain a parties allegation, and that the State did not request a parties charge in [ShisInday's] 1982 trial." State Habeas Record at 2151, ¶ 197. The court also found that in the second trial "the trial court charged the jury on the law of the parties based on the evidence presented at trial." State Habeas Record at 2151, ¶ 198. However, the state habeas court found that "the State's actions not to seek a parties charge in 1982 do[] not constitute an abandonment of an 'allegation' and that principles of double jeopardy and

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[40] In a separate claim on direct appeal, ShisInday claimed that the trial court should not have instructed the jury on the law of the parties because the State did not properly notify him that they would proceed on that theory. The Court of Criminal Appeals held as follows:

> We have consistently held that 'if the evidence supports a charge on the law of parties, the court may charge in the law of parties even though there is no such allegation in the indictment or information. Further, when the evidence supports both primary and party theories of liability, the trial court does not err in submitting a parties instruction. Here, the evidence established that both Zendal Peels and ShisInday were involved in kidnapping Harrison and disposing of her body. Therefore, the evidence supports a finding that ShisInday acted both as a principal and a party to Zendal's conduct. Accordingly, the court did not err by including a parties instruction in the charge.

Opinion on Direct Appeal, at 45-46.

collateral estoppel are not applicable to the trial court's charging the jury on the law of the parties in [his] 1998 re-trial." State Habeas Record at 2151, ¶ 200. The state habeas court concluded that the trial court properly delivered a parties charge. State Habeas Record at 2187, at ¶ 134.

ShisInday cannot succeed on this claim. ShisInday does not point to any federal or state law preventing reliance on the law of the parties when the initial trial focused on a defendant's liability as the principal actor. In his summary judgment response, ShisInday "acknowledges that the party charge is not plead [*sic*], and is not required to be plead [*sic*], in the indictment, it is a theory that the State did not pursue at the first trial." (Docket Entry No. 31 at 22). ShisInday argues that double jeopardy or collateral estoppel binds the prosecution to reliance on those theories of guilt presented in the first trial, but he provides no persuasive federal law to support that argument.[41] ShisInday has not shown that by abandonment, verdict, or judicial

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[41] ShisInday cites to *Zedner v. United States*, U.S. 126 S. Ct. 1976 (2006), which noted that "judicial estoppel 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id.* at 1987 (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)) (emphasis added). The Fifth Circuit has rejected judicial estoppel as a ground for habeas relief, noting that "there is no indication . . . that it is constitutionally mandated" and "has apparently never been applied against the government in a criminal case." *Nichols v. Scott*, 69 F.3d 1255, 1272 (5th Cir. 1995); *see also United State v. Ayala*, 107 Fed. App'x 410, 413 (5th Cir. 2004) ("Courts have frowned upon application of the doctrine of judicial estoppel in the criminal context and we see no reason to bind the government to its earlier concession.").

holding any issue was decided in his first trial that would trigger double jeopardy or equitable principles to prohibit his conviction as a party in his second trial. ShisInday has failed to show that the state court's review of his parties liability prosecution was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

VI. Constitutionality of ShisInday's Arrest, Confession, and Seizure of Evidence (claims 9 though 12).

ShisInday challenges his arrest and subsequent confession. ShisInday first alleges that the police violated the Fourth, Fifth, and Fourteenth Amendments by arresting him while he sought treatment at a hospital (claim nine). Based on the allegedly illegal arrest, ShisInday argues that the trial court should have suppressed evidence the police recovered from his car (claim ten). He also contends that the police secured his confession through coercive means (claim eleven). Finally, he faults the trial court for not allowing the jury to determine whether his confession was voluntary (claim twelve).

The state courts comprehensively considered the factual basis for these claims and addressed their merits. ShisInday does not challenge any specific factual finding made by the state courts other than generally to dispute the unfavorable result. This Court, therefore, will rely on the Court of Criminal Appeals' recitation of the facts surrounding his arrest and confession:

> [A]round 5 p.m. on July 18, 1981, ShisInday went to the emergency room of

John Sealy Hospital in Galveston, Texas, seeking psychiatric help. Between 10 p.m. and 1 a.m. Dr. Kayla Paul, a psychiatric intern, conducted a psychiatric examination and history of ShisInday. ShisInday appeared coherent, did not appear to be under the influence of drugs or alcohol, understood the questions, and responded appropriately. But Dr. Paul noted that ShisInday appeared tired, anxious, and sad. ShisInday told her that someone had told him that he had committed a crime, but he apparently could not recall the circumstances. Instead, he told her a story about killing a dog. ShisInday recounted meeting the victim the previous day and helping her with her car. Then he and his friend went to the victim's house for beer. After leaving her house, ShisInday hit a dog with his car. He pulled the dog into his car and, noting that it was injured and suffering, shot the dog in the head. Fearing that the dog's owner would discover what he had done, ShisInday tied some rocks to the dog and dumped it in the San Jacinto river. ShisInday also reported that he had not slept in three days or eaten in two. But he contradicted this when he told Dr. Paul that, after his encounter with the dog, he went to his friend's house and slept until morning.

Dr. Paul further testified that on the night she examined ShisInday she received a call from Detective Nixon of the Harris County Sheriff's Department, ordering security guards be posted outside ShisInday's hospital room to prevent him from leaving. Sergeant Ivan Isbell with the UTMB police arrested ShisInday at the hospital around 1:00 a.m. on July 19, 1981, and transported him to the Galveston jail. Around 2:00 a.m., a Harris County district judge signed a warrant for ShisInday's arrest for aggravated kidnapping. Detectives Nixon and Freeze delivered a copy of the warrant to the Galveston jail and at around 4:00 or 5:00 a.m. went to the hospital to speak with Dr. Paul. Dr. Paul informed them of the location where ShisInday had described dumping the dog. The police found the victim's body in that location.

At around 9:00 a.m., Nixon and Freeze took ShisInday to Alta Loma to receive the magistrate's warnings and then returned him to the jail. After making arrangements to have ShisInday's car towed to Harris County, the detectives picked ShisInday up from the jail around noon and took him to Harris County jail. On the way, ShisInday expressed to the detectives his fear that they or the police were going to beat him. He explained that guards and inmates at Angola prison in

Louisiana had beaten him before and he was apprehensive about being beaten again. Nixon and Freeze assured ShisInday several times that he would not be beaten. During this drive, ShisInday told the detectives his story about the dog.

After they arrived in Houston and ShisInday was processed, he agreed to speak with Nixon in an interview room. Nixon did not repeat the *Miranda* warnings to ShisInday, but reminded him of the warnings that he had received from the magistrate. ShisInday repeated the dog story. When Nixon showed ShisInday pictures of the victim in the morgue, ShisInday burst into tears. Disgusted, Nixon terminated the interview and asked Freeze to take ShisInday to the jail located in the basement of the building. On the elevator, ShisInday told Freeze that he was ready to make a confession, and the two returned to the interview room. ShisInday's oral confession was transcribed between 4 p.m. and 10:30 p.m. The statement was nine pages long and took six hours to transcribe because ShisInday made numerous changes. ShisInday went so far as to correct a grammatical element in the standard form language. ShisInday read and initialed the *Miranda* warnings appearing at the top of the page and signed the original and five copies of the statement.

> ShisInday's only question related to the meaning of the word "intelligently" in the context of the form language following the Miranda warnings ". . . I knowingly, intelligently and voluntarily waive the rights set out above and make the following voluntary statement." Nixon explained that "intelligently" meant that he understood what he was saying and the consequences of making the statement. ShisInday responded that he did understand and wanted to make the statement. According to Nixon, ShisInday appeared to understand everything during the interview and articulated details of the crime "extremely well."
>
> During the interview, ShisInday was given clean clothes to wear because he was still wearing the clothes he had on during the offense, and the sweat and blood were beginning to emit a foul odor. ShisInday was given food, drinks, and cigarettes, and had full access to the bathroom.

Opinion on Direct Appeal, at 13-15. This Court must decide whether federal habeas review or relief is available on ShisInday's challenges relating to his arrest and confession.

A. ShisInday's Fourth Amendment Claims

ShisInday claims that the police lacked probable cause to arrest him without a warrant

because they did not verify Zendal Peels' accusation before the arrest. On that basis, ShisInday argues that "[u]nder the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution, all evidence recovered as a result of this arrest and any statements made by ShisInday following the arrest are 'fruit of the poisonous tree,' and should have been suppressed." (Docket Entry No. 18 at 51). Binding federal law prevents this Court from considering the merits of ShisInday's Fourth Amendment claims.

"[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone v. Powell*, 428 U.S. 465, 494 (1976) (footnote omitted). The existence of state processes allowing an opportunity for full and fair litigation of Fourth Amendment claims, rather than a defendant's use of those processes, serves the policies underlying the exclusionary rule and bars federal habeas corpus consideration of claims under *Stone*. *See Caver v. State of Alabama*, 577 F.2d 1188, 1192-93 (5th Cir. 1978). The *Stone* bar "applies to all claims arising under the Fourth Amendment," including challenges to an arrest or the seizure of evidence. *Hughes v. Dretke*, 412 F.3d 582, 596 (5th Cir. 2005), *cert. denied*, ___ U.S. ___, 126 S. Ct. 1347 (2006).

ShisInday seeks to skirt *Stone*'s constraints by alleging that he did not have a full and fair opportunity to develop this issue in state court. ShisInday does not argue that the trial court ignored

his Fourth Amendment claims, but objects to the timing and results of the trial court's suppression hearing. ShisInday argues that he "was not able to obtain a fair hearing because the hearing did not take place until after the capital qualified jury was sworn in and the evidence began and the court had no choice to rule the evidence admissible." (Docket Entry No. 31 at 24). Respondent contends that the trial court could not hold a suppression hearing until the trial started because "ShisInday first challenged the legality of his arrest and confession during trial." (Docket Entry No. 21 at 41). ShisInday first filed a motion to suppress months before trial, Trans. at 202-04, though it does not appear that the trial court acted on that motion. Still, the trial court allowed ShisInday an opportunity to present his Fourth Amendment challenge. ShisInday has not pointed to any law that requires a trial court to consider the admissibility of evidence before the jury was selected and sworn.

ShisInday had an opportunity to present his claims at trial – an opportunity of which he took full advantage. ShisInday then availed himself of a full and fair opportunity to present his claims to the Court of Criminal Appeals. On direct appeal, the Court of Criminal Appeals refused to consider portions of ShisInday's argument because he did not raise them in the trial court, but generally found that ShisInday's arrest and confession met Fourth Amendment standards. ShisInday contends that his disagreement with the appellate ruling should get him around the *Stone* bar. However, even "[e]rrors in adjudicating Fourth Amendment claims are not an exception to *Stone*'s bar." *Moreno v. Dretke*, 450 F.3d

158, 167 (5th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 935 (2007); *see also Swicegood v. Alabama*, 577 F.2d 1322, 1324-25 (5th Cir. 1978). The Fifth Circuit has emphasized that the "'opportunity for full and fair litigation' [means] just that: 'an opportunity.'" *Janecka v. Cockrell*, 301 F.3d 316, 320 (5th Cir. 2002) (quoting *Caver*, 577 F.2d at 1192). "[A]bsent additional allegations that state processes routinely or systematically are applied in such a way as to prevent the actual litigation of Fourth Amendment claims, mistakes that thwart the presentation of Fourth Amendment claims do not render the *Stone* bar inapplicable." *Janecka*, 301 F.3d at 321. Disagreement with the outcome does not remove the *Stone* bar.

Because ShisInday took advantage of the opportunity to present his claims in state court, *Stone* requires this Court to forgo a renewed analysis of ShisInday's Fourth Amendment claims. This Court will not address whether ShisInday's arrest, confession, and subsequent seizure of evidence met Fourth Amendment standards.[42]

B. Fifth Amendment Claims

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[42] In the alternative, the Court of Criminal Appeals found that "[a] warrant is not required when an arrest is supported by probable cause and is made in a public place where the arrestee lacks a reasonable expectation of privacy." Opinion on Direct Appeal, at 20. The Court of Criminal Appeals correctly found that the information Zendal Peels gave the police, in conjunction with the fact that ShisInday told Dr. Paul that people accused him of committing a murder, gave the police probable cause for his arrest. As discussed above in the Fifth Amendment context, nothing about the circumstances surrounding ShisInday's confession violated his constitutional rights.

Under the Fifth Amendment, ShisInday also contends that the trial court should have suppressed his confession and any evidence gathered by the police because a coercive atmosphere made his statements involuntary. ShisInday contends that he did not knowingly and voluntarily confess because (1) his mental illness made him unable to appreciate the waiver of his rights; (2) the police threatened him with violence; (3) the police interrogated him for a prolonged period; and (4) the use of gruesome autopsy photographs overcame his will. ShisInday has not shown that the trial court improperly admitted his confession into evidence.

"A confession is voluntary if, under the totality of the circumstances, the statement is the product of the accused's free and rational choice." *United States v. Broussard*, 80 F.3d 1025, 1033 (5th Cir. 1996). "[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception[.]." *Oregon v. Elstad*, 470 U.S. 298, 305 (1985). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). That having been said, it must be remembered that "[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984); *see also Dickerson v. United States*, 530 U.S. 428, 443 (2000).

"The voluntariness of a confession is ultimately a legal determination" that "may also involve subsidiary factual determinations and mixed issues of law and fact." *Barnes v. Johnson*, 160 F.3d 218, 222 (5th Cir. 1998) (citations omitted). State courts unequivocally found that ShisInday's account of the circumstances surrounding his confession was not credible. The trial court issued findings and facts and conclusions of law after the evidentiary hearing. The trial court found that (1) the police did not coercively abuse, threaten, or promise ShisInday anything in return for his confession; (2) ShisInday was lucid and could understand the nature of his confession; (3) ShisInday did not experience any delusion, hallucination, or effects of mental illness while confessing; (4) the police did not deprive ShisInday of food or sleep; and (5) ShisInday did not invoke his right to silence or request an attorney's assistance. Opinion on Direct Appeal, at 17.

On direct appeal, ShisInday again challenged the admission of his confession. ShisInday particularly emphasized testimony from the suppression hearing detailing his history of mental illness. The Court of Criminal Appeals summarized that testimony as follows:

> At the hearing, the defense presented the testimony of Dr. Robert Sarmiento, a psychologist who gave ShisInday several tests in 1981 and 1982. Dr. Sarmiento testified that ShisInday has an IQ of 91, in the low end of average range, had a 4.7 grade level in reading and a 3.9 grade

> level in spelling. ShisInday's deficient academic achievements led Dr. Sarmiento to conclude that ShisInday had not developed these skills to his intellectual potential. Sarmiento also concluded that ShisInday suffers from fairly severe mental disorders, impairing his ability to make sound judgments and resulting in disturbed thought processes and disorganized thinking. After reviewing ShisInday's personal history, Sarmiento determined that ShisInday suffers from atypical paranoid schizophrenia. Sarmiento concluded that ShisInday's mental disorders probably prevented his understanding the *Miranda* warnings and "quite likely" impaired his judgment to waive his rights. But on cross-examination Sarmiento admitted that he had no evidence to say with certainty that ShisInday did not understand the warnings before he confessed.

Opinion on Direct Appeal, at 15-16. The Court of Criminal Appeals rejected ShisInday's assertion that his mental impairments rendered him unable to appreciate the waiver of his rights:

> Although ShisInday's psychological expert testified that ShisInday probably could not understand the warnings, evidence of the circumstances surrounding ShisInday's statement demonstrates otherwise. There was no indication that

ShisInday did not understand the *Miranda* warnings – he inquired about the use of the word "intelligently," corrected a grammatical element in the standard form language, expressed his desire to make the statement, and then provided a lengthy, detailed statement to which he made numerous corrections. Indeed, it was ShisInday's repeated changes to the statement that apparently extended the transcription process. Further, Nixon testified that ShisInday was given food and drink when he requested it. Finally, it was during the car ride to Houston that ShisInday expressed his fear of being beaten, and both Nixon and Freeze assured him that he would not be harmed. After the car ride, ShisInday never raised that concern again.

Although ShisInday sought psychiatric help at the hospital after committing the crime, Dr. Paul noted that ShisInday was lucid and oriented. ShisInday's self-reported auditory hallucinations and out-of-body experiences had occurred in the past and, according to ShisInday, had not happened during the commission of the crime.

Because the record does not indicate that ShisInday was unable to understand the *Miranda* warnings or that the State utilized coercive tactics designed to

> overbear ShisInday's will, we will defer to the trial court's findings that ShisInday knowingly waived his rights and that his confession was both voluntary and admissible.

Opinion on Direct Appeal, at 17-18.

The state courts found that ShisInday voluntarily and knowingly confessed without threats or coercion. This Court must honor that factfinding on federal review unless ShisInday proves otherwise by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). ShisInday has not met his AEDPA burden to rebut the presumptively correct finding that the police did not coerce his confession. There is no evidence of coercive or improper police activity. As noted by Respondent, "the circumstances surrounding ShisInday's confession involve standard police practices and do not rise to the level of coercive state action due to the indisputable fact that ShisInday was given oral and written *Miranda* warnings as evidenced by the credible testimony of several witnesses and ShisInday's own acknowledgment that he initialed and signed the written confession." (Docket Entry No. 21 at 50). The record suggests that, while ShisInday has experienced mental illness in his life, he was lucid at the time he confessed. The police did not create a coercive atmosphere, provided comfortable surroundings, and met ShisInday's physical needs. ShisInday repeatedly received and waived his *Miranda* warnings. ShisInday has not met his AEDPA burden in showing that police coercion rendered his confession involuntary.

C. Failure to Have the Jury Decide the Voluntariness of his Confession (claim 12)

ShisInday complains that the trial court violated "his constitutional right to have any defense presented to the jury" by not allowing the jury to decide whether he intelligently and voluntarily confessed. (Docket Entry No. 18 at 60). Under Tex. Code Crim. Pro. article 38 23(a),

> [n]o evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case. In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

As a matter of state law, ShisInday was entitled to an article 38.23 instruction only if the circumstances raised a factual issue concerning whether the police obtained evidence in violation of federal or state law. *See Thomas v. State*, 723 S.W.2d 696, 707 (Tex. Crim. App. 1986). ShisInday argues that this Court should

reverse his conviction because the jury did not consider the admissibility of his confession.

ShisInday raised this claim on direct appeal. The Court of Criminal Appeals found that he had inadequately briefed the claim. Opinion on Direct Appeal at 43-44. Specifically, the Court of Criminal Appeals found that ShisInday did not point to any place in the record where he requested that the trial court instruct the jury under article 38.23(a). On state habeas review, ShisInday provided greater detail regarding his claim, but based his argument entirely on the operation of state law. State Habeas Record at 255-58.[43] Respondent now argues that ShisInday has not exhausted the federal aspects of his jury instruction claim.

Federal habeas law requires the exhaustion not only of factual issues, but also of any legal argument. *See Kittelson v. Dretke*, 426 F.3d 306, 315 (5th Cir. 2005). ShisInday's state court briefing on this issue did not invoke, mention, or infer reliance on the federal constitution as a basis for overturning his conviction because of the alleged jury charge error. While habeas law does not require petitioners to make precisely identical arguments in both forums, a petitioner must make the state courts aware that he challenges his conviction or sentence under the federal constitution. *See Baldwin v. Resse*, 541 U.S. 27, 33 (2004). Because ShisInday did not

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[43] The state habeas application pointed out that trial counsel requested that the jury be instructed that it could disregard the confession if taken in violation of his constitutional rights. Tr. Vol. 21 at 7-9.

allow the state courts an opportunity to determine whether federal due process clause protections required the instruction, his claim is unexhausted. Texas' stringent abuse-of-the-writ doctrine acts to procedurally bar this claim from federal consideration and ShisInday makes no attempt to excuse his failure to exhaust.

Even if ShisInday exhausted this claim, he cannot prevail. While ShisInday's response to the pending summary judgment motion clarifies that he "was denied his right to a fair trial under the Due Process Clause," the essence of his claim invokes state, not federal, law. (Docket Entry No. 31 at 26). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (internal quotation omitted); *see also Bradshaw v. Richey*, ___ U.S. 74, ___, 126 S. Ct. 602, 604 (2005) ("We have repeatedly held that a state court's interpretation of state law . . . binds a federal court sitting in habeas corpus."). Nothing in federal law requires a state jury to decide the voluntariness of a criminal defendant's confession. The only question available on federal review, therefore, is whether the alleged state-law error "by itself so infected the entire trial that the resulting conviction violates due process." *McGuire*, 502 U.S. at 72. As a review of the facts surrounding his confession reveals, the trial court could reasonably find no justifiable challenge to ShisInday's confession that would require submission of the issue to the jury.

Had ShisInday exhausted this claim, it would not merit habeas relief.

VII. Presentation of An Extraneous Offense (claim 13).

During the guilt/innocence phase of trial, the prosecution adduced testimony that ShisInday contends violated his constitutional rights. Doyle Peels and Ron McHenry both testified that while ShisInday drove them to a skating rink on the day of the murder, he pulled out the murder weapon and pointed it at a police officer. Tr. Vol. 15 at 97-98, 122-23. ShisInday objected to this testimony at trial by arguing that it constituted extraneous offense evidence under Texas Rules of Evidence 404(b) and was more prejudicial than probative under Rule 403. Tr. Vol. 15 at 95, 120. The prosecution countered that the testimony only served to establish that ShisInday "was in possession of the gun, [it] was his gun, he's the person who used the gun or handled the gun at that particular time." Tr. Vol. 15 at 95. ShisInday now argues that, because this testimony was cumulative of other testimony which tied him to the weapon and also more prejudicial than probative, the testimony was fundamentally unfair in violation of the due process clause.

Respondent argues that this claim lacks procedural adequacy and substantive merit. When ShisInday raised this claim on direct appeal, he only cited state law; ShisInday never raised any federal constitutional objection to the evidence in state court. Respondent properly recognizes that ShisInday's reworking of the claim into a federal one runs afoul of the exhaustion doctrine. ShisInday never gave the

state courts an opportunity to decide whether the federal constitution would exclude testimony that he brandished a gun at a police officer. The unexhausted nature of this claim bars the Court from granting habeas relief.

Moreover, Respondent contends that any federal argument on this claim is not cognizable because it is inherently a matter of state, not federal, law. While Respondent contends that challenges to state evidentiary decisions are not cognizable on federal habeas review, such claims merit some degree of federal consideration, though under highly demanding standards. True, federal habeas courts do not "sit to review the mere admissibility of evidence under state law." *Little v. Johnson*, 162 F.3d 855, 862 (5th Cir. 1998). Nevertheless, habeas relief may lie if a state court's evidentiary rulings are so extreme in their error that they result in fundamental unfairness. *See id.*; *Hafdahl*, 251 F.3d at 536 ("If evidence of an extraneous offense is wrongly admitted, however, habeas corpus relief is proper only if the error is of such magnitude that it resulted in 'fundamental unfairness.'")). A federal court cannot "provide collateral relief simply because the state court's challenged conduct would have led to reversal if the defendant had been tried in the federal system; nor is relief authorized even if state evidentiary rules appear to have been violated." *Blankenship v. Estelle*, 545 F.2d 510, 516 (5th Cir. 1977). As noted by the Fifth Circuit,

> '[F]or an otherwise valid state conviction to be upset years later on federal habeas, surely something more than an

> evidentiary mistake must be shown. If mistake is enough, then never, simply never, will the process of repeated, prolonged, postconviction review cease. For in every trial, or at least nearly every trial, there will be, there are bound to be, some mistakes. What elevates the 'mistake' to a constitutional plane is at least two-fold. First, the mistake must be material in the sense of a crucial, critical, highly significant factor. Second, it must have some State complicity in it.'

Shaw v. Estelle, 686 F.2d 273, 275 (5th Cir. 1982) (quoting *Luna v. Beto*, 395 F.2d 35 (5th Cir. 1968) (Brown, C. J., specially concurring)). The relevant inquiry on federal habeas review if "the wrongfully admitted evidence has played a crucial, critical, and highly significant role in the trial[.]" *Little*, 162 F.3d at 862.

Even assuming that ShisInday is correct that the trial court should not have allowed witnesses to testify relating to his brandishing of a weapon on the day of the murder, that testimony was not crucial, critical, or highly significant at trial. On direct appeal, the Court of Criminal Appeals explained that the testimony "demonstrated ShisInday's ownership and control of the murder weapon" and "seemed to corroborate ShisInday's admission in his written statement that he was the one who shot Harrison." Opinion on Direct Appeal, at 39. The state courts decided that the probative value of that evidence exceeded its prejudicial nature. As other admissible evidence not only showed

ShisInday's guilt but also his possession and control over the gun, the Court finds that the guilt/innocence phase "extraneous offense" evidence was merely cumulative. The prejudicial effect of the jury knowing that ShisInday waived his pistol at a police officer would not be highly significant or critical. Nothing in the record suggests that the witnesses' testimony rendered his trial fundamentally unfair. This claim is denied.

VIII. Ineffective Assistance of Counsel (claims 14 and 23).

ShisInday raises two claims accusing his prior attorneys of deficient representation. First, ShisInday complains that trial counsel should have requested a jury instruction that would have allowed the jury to find that his intoxication on the day of the murder made him temporarily insane (claim 14). Second, ShisInday complains that the cumulative effect of errors by appellate counsel requires federal relief (claim 23).[44]

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under the *Strickland*

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[44] ShisInday also alleges that trial counsel should have objected more strenuously to testimony and argument suggesting that ShisInday raped the victim (claim 17). This Court will address that argument with claim 16 that accuses the prosecution of misconduct for adducing testimony about the possible rape.

standard, a criminal defendant's Sixth Amendment rights are "denied when a defense attorney's *performance* falls below an objective standard of reasonableness and thereby *prejudices* the defense." *Yarborough v. Gentry*, 540 U.S. 1, 3, (2003) (emphasis added); *see also Rompilla v. Beard*, 545 U.S. 374, 380 (2005); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700.

To establish deficient performance, the petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct." *Wiggins*, 539 U.S. at 521. Instead, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. In reviewing ineffectiveness claims "judicial scrutiny of counsel's performance must be highly deferential," and every effort must be made to eliminate "the distorting effect of hindsight." *Id.* at 689. An ineffective-assistance claim focuses on "counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct[,]" because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence[.]" *Id.* at 689-90.

A petitioner must also show that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694; *see also Wiggins*, 539 U.S. at 534. A reasonable probability is one that sufficiently undermines confidence in the outcome. *See Strickland*, 466 U.S. at 689; *Wiggins*, 539 U.S. at 534. The Court does not consider prejudice in a vacuum. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695.[45]

A. Jury Instruction on Voluntary Intoxication (claim 14)

ShisInday's confession indicated that he had been consuming alcohol and drugs before he murdered the victim. At the punishment phase of trial, Dr. Robert F. Sarmiento testified that ShisInday's mental disturbances prevented him from knowing the difference between right and wrong at the time of the murder. Tr. Vol. 20 at 80-81. Dr. Sarmiento did not attribute his insanity to substance abuse. Trial counsel requested a jury instruction of insanity based on Dr. Sarmiento's

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[45] "It bears repeating that the test for federal habeas purposes is *not* whether [an inmate] made that showing [required by *Strickland*]. Instead, the test is whether the state court's decision – that [the inmate] did *not* make the *Strickland* showing – was contrary to, or an unreasonable application of, the standards, provided by the clearly established federal law (*Strickland*), for succeeding on his IAC claim." *Schaetzle v. Cockrell*, 343 F.3d 440, 444 (5th Cir. 2003); *see also Busby v. Dretke*, 359 F.3d 708, 717 (5th Cir. 2004) "Of course, in reaching our decision, we must consider the underlying *Strickland* standards." *Schaetzle*, 343 F.3d at 444.

testimony. ShisInday argues that trial counsel should have sought an instruction under TEX. PENAL CODE § 8.04[46] that would have allowed the jury to decide that his substance abuse rendered him temporarily insane. ShisInday contends that trial counsel's failure to request an intoxication insanity instruction was deficient performance that prejudiced his defense.

Under Texas law, "for a defendant to benefit from the provisions of § 8.04, he must do more than merely present evidence of intoxication or even gross intoxication." *Arnold v. State*, 742 S.W.2d 10, 14 (Tex. Crim. App. 1987). A defendant must "establish 1) that [his] voluntary intoxication caused him not to know his conduct was wrong or 2) that it caused him to be incapable of conforming his conduct to the requirements of the law that he violated." *Hernandez v. Johnson*, 213 F.3d 243, 250 (5th Cir.

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[46] TEX. PENAL CODE § 8.04 states that:

(a) Voluntary intoxication does not constitute a defense to the commission of crime.

(b) Evidence of temporary insanity caused by intoxication may be introduced by the actor in mitigation of the penalty attached to the offense for which he is being tried.

(c) When temporary insanity is relied upon as a defense and the evidence tends to show that such insanity was caused by intoxication, the court shall charge the jury in accordance with the provisions of this section.

(d) For purposes of this section "intoxication" means disturbance of mental or physical capacity resulting from the introduction of any substance into the body.

2000); *see also Volanty v. Lynaugh*, 874 F.2d 243, 244 (5th Cir 1989); *Tucker v. State*, 771 S.W.2d 523, 534 (Tex. Crim. App. 1988). The state habeas court reviewed ShisInday's confession indicating that he "drank a six-pack of beer at the complainant's house and a couple of beers from the refrigerator," "they shared a joint," and he "'puffed very lightly' on a second joint." State Habeas Record at 2148, ¶ 181. Because of the small quantity of substances ShisInday allegedly consumed, the state habeas court found that ShisInday's "alleged level of intoxication, if any, . . . does not rise to the level of temporary insanity caused by intoxication that would require a jury instruction[.]" State Habeas Record at 2148, ¶ 183. On that basis, the state habeas court concluded that ShisInday's trial attorneys were not ineffective for failing to request an instruction because of "the lack of evidence that [ShisInday] did not know right from wrong as a result of temporary insanity caused by voluntary intoxication." State Habeas Record at 2184, ¶ 121. The state habeas court's decision survives review under the AEDPA.

ShisInday's confession showed that he had ingested some drugs and alcohol on the day of the murder. Even assuming that ShisInday is correct in arguing that "there was sufficient evidence from the confession to infer intoxication played a role in the murder," (Docket Entry No. 18 at 66), he presented no evidence that would show that his intoxication rose to the level of temporary insanity. ShisInday failed to "put on evidence not simply that he was intoxicated at the time of the offense but that he was insane as a result of the intoxication," thus he cannot complain that he was eligible "to receive a

jury instruction on the law of voluntary intoxication as a mitigating factor." *Hernandez*, 213 F.3d at 244. Accordingly, ShisInday cannot show that he merits habeas relief from trial counsel's choice not to request an intoxication insanity defense instruction. *See* 28 U.S.C. § 2254(d)(1).

B. Cumulative Effect of Appellate Errors (claim 23)

ShisInday makes the cursory argument that his appellate attorney engaged in "cumulatively deficient conduct." (Docket Entry No. 18 at 105). ShisInday does not, however, list any individual omission by his appellate attorney, much less aggregate any infractions into a viable cumulative error claim. Instead, ShisInday makes general statements about the Sixth Amendment standards and obliquely suggests that he has raised several independent ineffective-assistance-of-appellate-counsel claims in his petition.

On state habeas review, ShisInday faulted appellate counsel for not raising several claims, including his double jeopardy and collateral estoppel arguments. Even assuming that he intends to advance those individual claims again, ShisInday has not shown any error that requires habeas relief. R. P. Cornelius represented ShisInday at trial and on appeal. On appeal, he raised an exhaustive appellate brief raising 54 claims. State habeas counsel reasserted some of those claims and presented additional ones in his state habeas application. ShisInday does not identify any meritorious claim not advanced in state court or any issue otherwise

deserving of habeas relief. ShisInday has not specified what deficiencies in his appellate representation would give rise to federal habeas relief. Simply, ShisInday has shown nothing to cumulate. This Court finds that ShisInday has not met his AEDPA burden in refuting the state court's conclusion that appellate counsel provided adequate representation.

IX. Alleged Threats Made by the Prosecution Against Zendal Peels (claim 15).

In 1982, the State of Texas charged Zendal Peels with capital murder for his role in the murder. On November 18, 1982, the State dropped all charges against Peels. In a motion to dismiss, the prosecution described the reason for not prosecuting Peels:

> [Peels] made two statements in this case. The only statement in which [Peels] admitted any culpability in the commission of this crime was inadmissible and was suppressed by the court. This left the State with insufficient evidence that [Peels] was a party to the crime, but instead showed only that [Peels] was present at the scene at the time of the crime.

State Habeas Record at 1333. The State of Texas has never renewed any charges against Peels.

During ShisInday's second trial, the defense wished to call Peels as a witness. Knowing

that Peels would invoke his Fifth Amendment rights, trial counsel asked to have him do so before the jury. Tr. Vol. 19 at 3-4. The prosecution objected to calling him before the jury, but had no objection to him invoking his rights out of the jury's presence. Tr. Vol. 19 at 4-5, 6. Peels' attorney then appeared and stated that his client would invoke his Fifth Amendment right to remain silent. Tr. Vol. 19 at 6. When the defense persisted in wanting to bring Peels before the jury, the trial court held that "you can't call him in front of the jury, you can't comment on why he's not here, either side cannot comment on why he's not here," Tr. Vol. 19 at 8, though the parties could otherwise mention evidence showing his involvement in the murder, Tr. Vol. 19 at 9-10. The trial court then had Peels stand, identify ShisInday, and invoke his rights. Tr. Vol. 19 at 13. Afterwards, the prosecution commented "Just for the record, he does have a Fifth Amendment privilege due to the fact that he had at one time been charged with the offense of capital murder in this case and that case was dismissed and it, also, could be refiled." Tr. Vol. 19 at 13.[47]

ShisInday alleges that Peels only refused to testify because the prosecution bullied him with threats of a renewed capital prosecution. ShisInday argues that "the fact that the State . . . flexed its power to interfere with ShisInday's right to a fair trial is an abuse of its authority and a violation of its obligation to seek the truth." (Docket Entry No.

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[47] The trial court also denied ShisInday's request to have Peels testify in the punishment phase that the prosecution dropped all charges against him. Tr. Vol. 23 at 145-46.

18 at 67). On direct appeal, ShisInday argued that his constitutional rights should have trumped Peels' right not to incriminate himself. The Court of Criminal Appeals held that "[Peels] informed the court outside the jury's presence that he would invoke his Fifth Amendment privilege against incrimination if called as a witness. [Peels'] assertion of his Fifth Amendment right overrode ShisInday's right to compulsory process of witnesses." Opinion on Direct Appeal, at 30-31. When ShisInday reargued this claim on state habeas review, the state court concluded that "the trial court properly refused to allowed [ShisInday] to call Peels to testify in order for Peels to invoke his Fifth Amendment right; Peels' invoking of his Fifth Amendment right overruled [ShisInday's] constitutional right to compulsory process of witnesses." State Habeas Record at 2170, ¶ 67.

ShisInday again challenges Peels' ability to exercise his Fifth Amendment rights. Now, however, ShisInday focuses less on whether Peels should have been able to plead the Fifth Amendment, and instead accuses the State of putting Peels in a position which forced him to exercise that right. "A prosecutor may not intimidate a witness into invoking the Fifth Amendment in order to interfere with a criminal defendant's right to compulsory process." *Brown v. Cain*, 104 F.3d 744, 749 (5th Cir. 1997). While "substantial governmental interference with a defense witness' choice to testify may violate the due process rights of the defendant." *United States v. Dupre*, 117 F.3d 810, 823 (5th Cir.1997), "a witness' right against self-incrimination will

outweigh a defendant's right to force that witness to testify." *Brown*, 104 F.3d at 749.

ShisInday has not shown that the prosecution acted in any way to force Peels to refuse to testify. In fact, the only mention of renewed prosecution for the crime was almost an afterthought, made when it was abundantly clear that Peels would not testify.[48] ShisInday has not shown that the prosecution had any other contact with Peels, much less contact involving threats or coercion.[49] ShisInday has not shown that the prosecution improperly coerced Peels into refusing to testify. The state courts, therefore, correctly found that Peels' rights trumped ShisInday's right to a fair trial in this instance. ShisInday fails to show entitlement to habeas relief under the AEDPA on this claim. *See* 28 U.S.C. § 2254(d)(1).

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[48] The state habeas court found that ShisInday "did not request a hearing to determine whether the State had an 'ongoing investigation' of Peels which would serve as basis for Peels asserting his Fifth Amendment rights." State Habeas Record at 2134, ¶ 111.

[49] Moreover, ShisInday has not described how Peels' testimony would be a benefit to him. ShisInday argues that "[i]t is clear from the statements Peels gave to the police at the time, he was intimately involved in the events surrounding the death of Ms. Harrison." (Docket Entry No. 18 at 69). The record is equally clear that Peels' account to the police placed a great deal of the responsibility for the murder on ShisInday. Further, Peels' police statements indicate that ShisInday confessed to him that he raped the victim and that he killed her to hide that crime. State Habeas Record at 1318-24. The Court strongly questions whether such information would have been benefitted the defense.

X. Testimony Concerning Possible Rape (claim 16 and 17).

ShisInday argues that the prosecution engaged in misconduct by suggesting that he raped the victim. ShisInday also argues that trial counsel should have more actively prevented that information from coming before the jury. When the prosecution first charged ShisInday with capital murder in 1982, the indictment alleged that he committed a murder in the course of a rape. The prosecution dropped that allegation before trial. During the first day of jury selection in ShisInday's second trial, the trial court inadvertently read to the jury the paragraphs of the indictment relying on rape. Tr. Vol. 3 at 12-13. The prosecution indicated that it would not seek a conviction based on rape as a precursor to capital murder.

At trial, the prosecution called Dr. Eduardo Bellas, the doctor with the Harris County Medical Examiner's Officer who performed an autopsy on the victim. During Dr. Bellas' testimony, he explained that there were no injuries on the victim's external genitalia. Tr. Vol. 18 at 169. Dr. Bellas testified that he took swabs from the victim's oral, genital, and anal cavity, but only the vaginal cavity contained sperm cells. Tr. Vol. 18 at 171. Dr. Bellas testified that he found "abundant . . . seminal fluid material." Tr. Vol. 18 at 170. However, the sperm cells had broken down too far to be usable for additional analysis. Tr. Vol. 18 at 171. Dr. Bellas also testified that DNA was not a common forensic tool in 1981. Tr. Vol. 18 at 172. On cross-examination, Dr. Bellas reiterated that there was no

evidence of forced intercourse. Tr. Vol. 18 at 181-82. Another expert witness confirmed the presence of sperm cells, but corroborated Dr. Bellas' testimony that they could not be tested for DNA. Tr. Vol. 18 at 222. Trial counsel made no objection to the expert testimony that suggested sexual intercourse and possibly rape.

During the penalty phase closing arguments, the prosecution suggested that, in the context of the other evidence and testimony, the evidence of seminal fluid indicated that ShisInday probably raped the victim:

> And think about. This man stopped to help her. He looked nice. She probably thought at that point in time how lucky I am. I am so lucky. Some weirdo didn't stop to help me. He looked like a normal guy. That's what makes him so dangerous. That's what makes him so scary. You wouldn't see this man coming. You wouldn't know in the parking lot that she was in, that she – you wouldn't want to leave that parking lot with this man stopping to help you. You wouldn't have suspected it. She never did.
>
> Now, I don't know if she invited him to follow her home to make sure she got home okay or maybe he just offered. Let me follow you home and make you sure you get home okay. I do suspect that she wasn't afraid. And maybe she didn't –

maybe she didn't offer at all. Maybe she didn't ask. Maybe he just followed her home. I don't know. But I do suspect that she wasn't worried, that she thought that it was all going to be okay.

And then when you get into the house. When did Sylvia Harrison realize I am not so lucky? I am not as lucky as I thought I was. This is not a good deal. This is what I have always been told about. This is what my dad's always told me about. Don't talk to strangers. When did she realize she was – it was going to be a bad deal? And you know when you read this statement you know more happens in the house than what's in the statement. It is the only thing that makes any sense. Burning the bedroom? The spermatozoa that was found on the medical exam. The autopsy report. Common sense tells you what happened in that house.

. . .

But then [ShisInday's statement] goes into how they smoked pot in this statement is what he says. That's what he says. It doesn't make any sense because he wants to imply that Zendal has done something. But then they sit around. It doesn't make any sense. I submit to you that he and Zendal were in it together. And I don't have any doubt, I

> think that the evidence is probably pretty clear, that there was some sort of a rape involved because if not some sort of rape –

Tr. Vol. 25 at 34-36. The defense objected that the argument was "[o]utside the record." Tr. Vol. 25 at 36. The trial court stated: "Ladies and Gentlemen, you will recall the evidence. The lawyer's arguments are not evidence." Tr. Vol. 25 at 36. The prosecution continued:

> You got the statement and only thing that makes any sense because the fire in the bedroom, the fire in the living room, taking her out of the house. Why take her out of the house? Why knock her unconscious and take her out of the house except for something horrible has happened in the house? And you got the physical evidence from the medical examiner's report about sperm and, unfortunately, we didn't have DNA back then or we would know the answer to that question. But I promise you it makes perfect sense of what happened in that house.

Tr. Vol. 25 at 36-37.

On direct appeal, ShisInday complained that the expert testimony and the prosecution's use of that evidence to suggest rape violated state law and the federal constitution. The Court of Criminal Appeals found that ShisInday failed to preserve error for appellate review. Opinion on Direct Appeal, at

39-40, 59. The state habeas court reiterated that procedural finding when ShisInday renewed his claim in his state habeas application. State Habeas Record at 2168, ¶ 57-58; at 2173-74 ¶¶ 79, 82. In the alternative, the state habeas court found that "the State's proper argument was a reasonable deduction from the evidence that [ShisInday] and/or Peels raped the complainant as part of the larger offense of capital murder" and that ShisInday had not proved that the argument "was so extremely or manifestly improper, if at all, so that [he] was deprived of a fair trial." State Habeas Record at 2174, ¶¶ 80-81, 84. Further, the state habeas court found that "the State's argument was properly supported by the evidence of sperm in the complainant's vaginal cavity, the taking and disposing of items from the complainant's house, [ShisInday's] written statement, and the fire which [ShisInday] and Peels started in the living room and the bedroom of the complainant's house." State Habeas Record at 2174, ¶ 83.

ShisInday renews his challenges to the admission of, and reference to, evidence showing sexual activity, and possibly rape, sometime before the victim's death. ShisInday, however, makes no effort to overcome the state courts' procedural bar of this claim. Absent a sufficient showing of cause and prejudice, this Court cannot grant habeas relief on ShisInday's claims.[50] Adequate and independent state law forecloses federal consideration of

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[50] ShisInday's claim that trial counsel should have objected to the testimony could possibly serve as cause to overcome the procedural bar. However, for the reasons explained above, ShisInday cannot make an adequate showing of prejudice.

ShisInday's claims relating to evidence and testimony concerning possible rape.

Even if this Court could reach the merits of ShisInday's claims, he has not made a compelling case for habeas relief. ShisInday has not pointed to any Supreme Court precedent that would have prevented the expert witness from testifying about the condition of the victim's body, and specifically about the "abundant" presence of seminal fluid. Federal law likewise does not hold that the prosecution's reliance on inferences from the trial evidence violated the Constitution. "In habeas corpus proceedings, [this Court] review[s] allegedly improper prosecutorial statements under a strict standard." *Dowthitt v. Johnson*, 230 F.3d 733, 755 (5th Cir. 2000). A federal habeas court's review of prosecutorial misconduct claims is "'the narrow one of due process, and not the broad exercise of supervisory power.'" *Darden v. Wainwright*, 477 U.S. 168, 180 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). Accordingly, "'[a] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone. The determinative question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict.'" *United States v. Bernard*, 299 F.3d 467, 488 (5th Cir. 2002) (quoting *United States v. Iredia*, 866 F.2d 114, 117 (5th Cit. 1989)); *see also Styron v. Johnson*, 262 F.3d 438, 449 (5th Cir. 2001); *Ortega v. McCotter*, 808 F.2d 406, 408 (5th Cir. 1987) ("'A prosecutor's improper argument will, in itself,

exceed constitutional limitations in only the most egregious cases.'").[51]

While no direct evidence of rape came before the jury, the prosecution did not run far afield in suggesting that a sexual assault possibly occurred. Dr. Bellas testified at trial that the victim's vaginal cavity contained an "abundant" amount of seminal fluid. The victim's body was nude when discovered by the police, though ShisInday explained that they stripped her clothing only immediately before dumping the corpse. ShisInday and Peels destroyed evidence that may have allowed additional development into the question of whether a rape took place, including by setting fire to the victim's home. The argument that a rape may have occurred is not outlandish in light of the circumstantial evidence at trial. The prosecution's reliance on the inferences of rape did not violate ShisInday's constitutional rights.

ShisInday contends that trial counsel should have more actively challenged the rape testimony, thereby preserving the issue for appellate consideration and possibly preventing its admission. ShisInday has not shown any reasonable manner in which trial counsel could have limited testimony relating to the autopsy. Further, on habeas review trial counsel submitted an affidavit stating that he "had no accurate recollection of how he viewed the cited jury arguments at the time, but that he prefers

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[51] Under Texas law, closing arguments must be based on trial evidence, the logical assumptions flowing from that evidence, a response to defense argumentation, or a plea for law enforcement. *See Wilson v. State*, 7 S.W.3d 136, 147 (Tex. Crim. App. 1999).

to rebut any of the State's unreasonable deductions rather than object, and that an objection sometimes emphasizes an argument more." State Habeas Record at 2137, ¶ 129. ShisInday has not shown that trial counsel was ineffective, or that a different result would have been possible had defense counsel more strenuously objected to the insinuations of rape. ShisInday has not shown an entitlement to relief based on the suggestion that he raped the victim.

XI. Trial Testimony About the Exercise of ShisInday's Constitutional Rights (claims 18, 19).

ShisInday contends that the prosecution violated the Constitution by commenting on his exercise of the right to silence and the right to a jury trial. During the punishment phase, ShisInday called Dr. Robert Sarmiento to explain how factors in ShisInday's childhood impacted his mental health. In addition, Dr. Sarmiento testified that some of ShisInday's more pronounced mental difficulties such as schizophrenia were in remission or had improved, though some underlying personality traits still caused him problems. Tr. Vol. 22 at 103. In conjunction with that testimony and in response to the defense's question of whether ShisInday demonstrated remorse, Dr. Sarmiento testified that

> when I saw him before he said that he was sad that the girl had died but that he didn't really take any real responsibility for that. He blamed Zendal. He blamed the police. He blamed his parents. He blamed society.

> And now I think he's really come to realize that he's responsible for his own actions and really to understand why it is wrong to do that. You know, not just that you get in trouble for it – which is a fairly primitive level of moral development – or in the event that it's illegal, but that the principle behind it. He said the pain that it caused the family and coworkers and everybody that knew the young woman.
>
> So, he understands that that is why it is wrong to do things, to do something like that because of the pain it caused, which is actually a very high level of moral development to understand the principle behind right and wrong, not just the fact that it is wrong but understand why with respect to how it affects other people and so on.

Tr. Vol. 22 at 109-10. After that testimony, trial counsel passed the witness. The prosecution then engaged Dr. Sarmiento in the following colloquy:

> The State: Well, Doctor, on that last point are you saying the defendant has indicated to you that he's responsible for the death of Miss Harrison and accepted the fact that he's the one that caused her death during the kidnapping?

Dr. Sarmiento: Yes.

The State: Then why would he have plead not guilty?

Dr. Sarmiento: Well–

Tr. Vol. 22 at 110. Trial counsel immediately objected, arguing that the comment infringed upon ShisInday's right to a jury trial. The trial court sustained the objected and instructed the jury to disregard the prosecutor's question. Trial counsel then unsuccessfully moved for a mistrial. Tr. Vol. 22 at 110-111.

On direct appeal, ShisInday argued that the prosecutor's question infringed on both his right to a jury trial and on his right to remain silent. The Court of Criminal Appeals rejected the State's argument that ShisInday invited any error by adducing testimony of his remorse: "[I]t was manifestly improper for the prosecutor to ask why ShisInday decided to plead not guilty." Opinion on Direct Appeal, at 57. Even though "the question was improper," the Court of Criminal Appeals found that "the trial court's instruction to disregard cured any error. Any injury from an improper comment is obviated when the court instructs the jury to disregard, unless the remark is so inflammatory that its prejudicial effect cannot be removed by such an admonishment." Opinion on Direct Appeal, at 57. After reviewing the record and relevant state law, the Court of Criminal Appeals, found that "the prosecutor's isolated comment during the punishment phase, which was immediately followed by an admonishment to disregard, was not so prejudicial

that it could not be cured. The comment did not reveal to the jury any prejudicial information that it was not already aware of." Opinion on Direct Appeal, at 58-59.

Again on federal review, ShisInday claims that the prosecution's comment and the trial court's failure to grant a mistrial violated his constitutional rights. Without question, it is constitutionally unacceptable for a prosecutor to disparage a defendant's exercise of his constitutional rights, particularly his right to silence. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *see also Griffin v. California*, 380 U.S. 606, 615 (1965) ("[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt."). The Supreme Court, however, has never held that similar improper prosecutorial comments or questions require an automatic mistrial. Instead, the Supreme Court requires the trial court to inform the jury that it will not consider a defendant's exercise of constitutional rights. *See Carter v. Kentucky*, 450 U.S. 288 (1981).

Here, the trial court promptly instructed the jury to disregard the prosecutor's question. The Court of Criminal Appeals found that the instruction cured any error. Federal law presumes that juries follow their instructions. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985). This is not a case where "the risk that the jury will not, or cannot, follow

instructions is so great, and the consequences of the failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135 (1968). Nothing indicated that the trial court's instruction was somehow insufficient to remove the taint of the improper question. ShisInday has not provided any reason to suppose that the circumstances surrounding the prosecution's question or the general climate of the trial prompted the jury to ignore the trial court's direction. Accordingly, ShisInday fails to meet the AEDPA standard with respect to this claim.

XII. Introduction of Records Detailing Prior Conviction (claim 20).

During the punishment phase of trial the prosecution introduced into evidence criminal judgments against ShisInday for crimes he previously committed. Among the judgments, the prosecution introduced pen packets detailing: (1) Florida convictions for grand and petit larceny (Exhibit 105) and (2) Louisiana convictions for burglary and attempted escape (Exhibit 106). Tr. Vol. 31, State's Exhibits 105, 106.[52] When the prosecution introduced those judgments, ShisInday first objected to Exhibit 106 because it "does not allege a crime that is an offense in the State of Texas, let alone a felony. It

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[52] The prosecution also presented pen packets detailing ShisInday's convictions in Texas for impersonating a peace officer, revocation of probation, and aggravated assault on a peace officer. Tr. Vol. 31, State's Exhibits 102, 103. ShisInday's federal petition does not challenge the integrity of those convictions.

was not even alleging an offense, it doesn't show the safeguards he had a right to a lawyer, he either had a trial or waived a jury trial." Tr. Vol. 22 at 16. When the trial court asked if the defense meant that ShisInday "waived a jury and he didn't have a lawyer," trial counsel responded "Yes. I am saying it doesn't show that he waived a jury or didn't have a lawyer." Tr. Vol. 22 at 16-17. Trial counsel did not present any evidence or testimony showing that ShisInday lacked legal representation or did not waive his rights, instead he argued that the judgments did not reflect that the courts protected ShisInday's constitutional rights in those cases. ShisInday raised a similar challenge to Exhibit 105. Tr. Vol. 22 at 17. The trial court allowed evidence of both convictions to come into evidence. Tr. Vol. 22 at 16-18.

On direct appeal, ShisInday challenged the introduction of the criminal judgments. The Court of Criminal Appeals found that

> [i]n a collateral attack on the judgment of a prior conviction, the burden is on the attacking party to show that the complete records of the cause were silent as to jury waiver or that the state in which the judgment was instated required jury waiver to be reflected on the face of the judgment. ShisInday fails to meet this burden. He also failed to show that he was without counsel in the prior proceedings. In fact, all of the exhibits indicate that ShisInday did have counsel.

Opinion on Direct Appeal, at 51 (footnote omitted). ShisInday renewed his claim on state habeas review.[53] While noting that it did not have to consider the issue as it had been adjudicated on direct appeal, the state habeas court alternatively rejected the claim that ShisInday was without counsel. The state habeas court found that Exhibit 105 "contains an application and a signed court order for an appointment of a public defendant to represent [ShisInday]" and Exhibit 106 "recites that [ShisInday's] plea was entered after [ShisInday] 'had the benefit of the advice of counsel.'" State Habeas Record at 2140, ¶ 140; at 2176, ¶ 92. The state habeas court also found that ShisInday "fails to show harmful error, if any, based on the two sentences in [ShisInday's] Florida judgment and sentence[.]" State Habeas Record at 2177, ¶ 97.

Federal law prevents the enhancement of an inmate's sentence with convictions obtained when the inmate lacked legal representation. *See Burgett v. Texas*, 389 U.S. 109, 115 (1967) ("To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right."). Federal law, however, assumes that prior courts have zealously guarded a defendant's rights.

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[53] On state habeas review, ShisInday also complained that the judgments were too remote and prejudicial for the jury's consideration. He does not make that argument in his federal habeas petition.

See Sones v. Hargett, 61 F.3d 410, 420 (5th Cir. 1995) (rejecting the argument that a court "must presume the invalidity of any prior conviction when the evidence supporting it is silent on the issue of representation"). "[A] habeas petitioner has the burden of proving that the convictions used by the State to enhance his sentence were uncounseled." *Mattheson v. Maggio*, 714 F.2d 362, 365 (5th Cir. 1983). In such cases, "the presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant." *Parke v. Raley*, 506 U.S. 20, 31 (1992).

In state court, ShisInday made no effort to prove that he was without counsel or otherwise failed to waive his constitutional rights in the convictions found in State's Exhibits 105 and 106. ShisInday has not provided any clear and convincing evidence on federal review that would call into question the state factfindings on this issue. The challenged criminal judgments do not on their face suggest that ShisInday's constitutional rights were violated, and, in fact, give every indication that counsel represented him in each conviction. As ShisInday bases this claim entirely on speculation, the state courts' denial of this claim was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

XIII. Self-Representation on Habeas Review (claim 21).

ShisInday has at various points in his litigation history, including on federal review, sought to proceed *pro se* or in a hybrid representation fashion. He now claims that the state courts violated

his constitutional rights by not allowing him to proceed *pro se* in his habeas action. Because ShisInday notes that he has a long history of litigating issues himself and feels he could have ably prosecuted the action, he now asks this Court to void the results of his state habeas action and order the initiation of new *pro se* state proceedings.[54]

The Constitution does not require States to make a habeas avenue of relief available, does not guarantee counsel in those proceedings, and provides no due process protection for the regularity of those actions. *See Coleman*, 501 U.S. at 752; *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). ShisInday does not identify any Supreme Court precedent that requires a state court to honor an inmate's request to proceed in state habeas without an attorney. ShisInday simply does not show any constitutional basis for his argument.

Even if the Constitution required Texas to allow his *pro se* or hybrid status, no federal habeas remedy exists for the relief ShisInday requests. The federal habeas writ provides only one remedy – the liberation of an inmate held in violation of the Constitution. *See Fay v. Noia*, 372 U.S. 391, 430-31 (1963) ("Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power . . . ."); *Smith v. Lucas*, 9 F.3d 359, 366 (5th Cir. 1993) ("[T]he writ

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[54] ShisInday, however, does not mention his history of filing frivolous lawsuits. *See ShisInday v. Texas Dept. of Criminal Justice-Agency*, 124 Fed. App'x. 898, 900 (5th Cir. 2005).

has but one remedy – to direct the liberation of a state prisoner whose confinement violates federal law."). This Court has no power to require the state courts to initiate new proceedings, much less when the alleged violation is collateral to an inmate's conviction and sentence. This Court cannot provide the relief ShisInday requests.[55]

XIV. Cumulative Error (claim 22).

ShisInday argues that, taking the cumulative effect of the alleged trial errors and particularly the ineffective assistance of his trial attorneys, he has shown cumulative error that requires habeas relief. An independent claim based on cumulative error is viable only where "(1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors 'so infected the entire trial that the resulting conviction violates due process.'" *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir. 1992) (*en banc*) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). "Meritless claims or claims that are not prejudicial cannot be cumulated, regardless of the total number raised." *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996); *see also Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir.

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[55] ShisInday first raised this issue in his amended petition which he filed well after the AEDPA's limitations period expired. Relying on *Mayle v. Fenix*, ___ U.S. ___, 125 S. Ct. 2562 (2005), Respondent argues that this Court should not consider this claim because it is time barred. Because no federal habeas relief exists for this claim, the Court need not address the time-bar issue.

1987) ("Twenty times zero equals zero."). The state habeas court found no cumulative error. State Habeas Record at 2152, ¶ 202; at 2188-89, ¶ 138. On federal review, ShisInday has not demonstrated any error of constitutional magnitude at his trial. In short, ShisInday "has presented nothing to cumulate." *Yohey v. Collins*, 985 F.2d 222, 229 (5th Cir. 1993). Accordingly, ShisInday cannot show that the state court finding of no cumulative error was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).

XV. Exemption from Execution Due to Mental Illness (claim 24).

ShisInday contends that his execution would violate the Constitution's cruel and unusual punishment clause because of his history of mental illness and mental disorders. ShisInday cobbles together state, federal, and international law to argue that the evolving standards of decency that guide Eighth Amendment law prohibit capital punishment for the insane. Primarily, ShisInday sees the Supreme Court's exemption from execution of the mentally retarded in *Atkins v. Virginia*, 536 U.S. 304 (2002), and of juveniles in *Roper v. Simmons*, 543 U.S. 551 (2005), as milestones along a path that leads to the same exemption for mentally-ill offenders. ShisInday asks: "If the diminished culpability associated with youth and mental retardation render the death penalty an excessive punishment when used against offenders from those categories, should not defendants suffering from serious mental

disorder[s] other than retardation, also be ineligible for execution?" (Docket Entry No. 18 at 108).

ShisInday did not present this claim in state court. As ShisInday completely failed to raise his challenged claims in state court, and Texas would find any belated attempt to raise them an abuse of the writ, procedural law bars federal consideration of their merits. Yet, even if ShisInday presented his exemption-from-execution claim in a procedurally adequate manner, he still does not make a meritorious argument for relief. No precedent extends exclusion from execution in the manner ShisInday requests. *See In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006) (finding that *Atkins* did not exempt mentally ill inmates from execution); *In re Woods*, 155 Fed. App'x 132, 136 (5th Cir. 2005) (same). ShisInday asks this Court to find that an emerging accord exists that would make the execution of the insane violate standards of decency, yet fails to square that argument with the prohibition against the creation of new law on habeas review found in *Teague v. Lane*, 489 U.S. 288 (1989). Even had ShisInday raised this claim in state court, this Court finds that he has not demonstrated entitlement to federal habeas relief

XVI. Prolonged Stay on Death Row (claim 25).

ShisInday contends that his quarter of a decade on death row should liberate him from his sentence. ShisInday gathers together law from around the world to justify his claim that psychological pressure suffered by those awaiting death amounts to a cruel and unusual punishment.

The Fifth Circuit has rejected the claim that the length of time before an inmate's execution violates the Constitution. *See White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996); *Lackey v. Scott*, 52 F.3d 98 (5th Cir. 1995). *Teague*'s non-retroactivity principle prevents this Court from granting relief on this claim.

CERTIFICATION OF ISSUES FOR APPEAL

Although ShisInday has not yet requested that this Court grant him a Certificate of Appealability ("COA"), this Court can consider the issue *sua sponte*. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). Under the AEDPA, a prisoner cannot seek appellate review from a lower court's judgment without receiving a COA. 28 U.S.C. § 2253(c). "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack v. McDaniel*, 529 U.S. 473, 482 (2000). A court may only issue a COA when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The Supreme Court has explained the standard for evaluating the need for a COA on claims rejected on their merits as follows: "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §§ 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336-38. On the other hand, a district court which has denied a habeas petition on procedural grounds

should issue a COA "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336-38. Unless the prisoner meets the COA standard, "no appeal would be warranted." *Slack*, 529 U.S. at 484.

Under the appropriate standard, ShisInday has not shown that this Court should certify any issue for appellate consideration. This Court denies ShisInday a COA on all the claims raised by his petition.

CONCLUSION

"Though the penalty is great and our responsibility heavy, our duty is clear." *Rosenberg v. United States*, 346 U.S. 273, 296 (1953) (Clark, J.). For the reasons described above, the Court finds that ShisInday has not shown entitlement to federal habeas relief. The Court **GRANTS** Respondent's motion for summary judgment. This Court **DENIES** ShisInday's petition and **DISMISSES** all ShisInday's claims **WITH PREJUDICE**. No Certificate of Appealability will issue in this case.

Signed at Houston, Texas on March 9, 2007.

/s/ Gray H. Miller
Gray H. Miller
United States District Judge

Appendix D

Opinion of the Texas Court
of Criminal Appeals Dated
September 12, 2001

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. 73,351

SHOZDIJIJI SHISINDAY (a.k.a. Danny Dean Thomas), Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL
FROM HARRIS COUNTY

KEASLER, J. *delivered the opinion of the Court, which* Keller, P.J., *and* Meyers, Hervy, *and* Holcomb, J.J., *joined, and which* Womack, J., *joined in part, filing a concurring opinion.* Price, J., *concurred in the result.* Johnson, J., *filed a dissenting opinion.*

OPINION

Shozdijiji Shisinday was convicted of capital murder on September 2, 1998.[56] Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure article 37.0711,

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[56] TEX. PENAL CODE ANN. §19.03.

§§ 2(b) and 2(e), the trial judge sentenced Shisinday to death.[57] Direct appeal to this Court is automatic.[58] Shisinday claims that the trial judge erred in numerous respects and that his conviction should be reversed. We affirm Shisinday's conviction.

Factual Background

The evidence at the guilt/innocence phase of trial revealed that in July of 1981 Shisinday and his girlfriend, Phoebe, were staying at the home of James Peels, his two sons, fifteen-year-old Doyle Peels and seventeen-year-old Zendal Peels, and Martha Ann Tarver. On July 17, Shisinday gave Doyle a ride in his 1969 black-and-white Cadillac to pick up Doyle's work schedule at K-Mart. Shisinday entered the store with Doyle and purchased some ammunition in the sporting goods department. Later that evening, Shisinday, accompanied by Zendal, drove Doyle and Ronald McHenry to the skating rink. On the way there, Shisinday stopped next to a police officer at a red light. Shisinday pulled his gun out of the armrest where he normally kept it, pointed the gun at the officer, and asked the boys if he should shoot him. They pleaded with Shisinday to put the gun away. Shisinday waved the gun around at them and then pointed it at Doyle's side. Shisinday returned the gun to the armrest once they arrived at the skating rink. Shisinday and Zendal arranged to

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[57] Art. 37.0711, § 2(g). Unless otherwise indicated, all future references to Articles refer to Code of Criminal Procedure.

[58] Art. 37.07, § 2(j).

pick the boys up at the rink around 10:30 p.m. but never showed up.

According to Shisinday's July 19th transcribed statement and testimony from other witnesses, Shisinday and Zendal went shopping at a Safeway store after dropping the boys off at the rink. As they were leaving the store, they spotted nineteen-year-old Sylvia Harrison who was having car trouble. They stopped to help her, and Shisinday determined that she needed a new fan belt. They drove her across the street to an auto parts store, purchased the belt, and put it on her car. Harrison asked Shisinday and Zendal to follow her down the street to her house to make sure her car did not overheat again. Once they arrived, Shisinday fixed a leak in her car's "heater hose." She offered them a beer and invited them into the house. They sat in her living room, drank beer, and smoked some marijuana.

According to Shisinday's statement to the police, Zendal unexpectedly hit Harrison in the side of the head with Shisinday's gun, which Zendal had concealed in a paper bag. They carried Harrison, unconscious, out to the car and shoved her down on the passengerside floorboard. They also took several items from her house including her telephone and eye glasses. Shisinday drove away with Zendal sitting in the passenger seat. Harrison regained consciousness, kicked the steering wheel, and bit Shisinday's hand. Shisinday told Zendal to grab her, and Zendal hit her in the head again with the gun, knocking her out. She regained consciousness again, and Zendal repeatedly hit her in the head with his knife until she passed out. She came to once more and began

repeating, "God help me." Shisinday got his gun, put it to the side of her head, and shot her one time. They drove her to a bridge near the river and picked up some cinder blocks. They then drove to a more secluded bridge and parked under one of the support pillars. Shisinday looked around to see if anyone was nearby. Zendal removed Harrison's clothes and cut off her bra. After tying cinder blocks to Harrison's feet and neck with rope, they dumped her in the San Jacinto River. Shisinday broke off a willow branch and brushed away their footprints as they returned to the car. They drove to a grocery store parking lot where they threw Harrison's clothes and other personal items in a dumpster. Then they went to a car wash and washed the outside and inside of the car, particularly the floorboard, which was covered in blood.

Upon arriving at the Peelses' residence just before 4:00 a.m. on July 18th, Shisinday and Zendal were confronted by James Peels who wanted to know where they had been. Shisinday went into the main bedroom where Martha Ann Tarver was sleeping. He woke her and told her that they were late because they had run over a dog and showed her what he claimed was a dog bite on his hand. After Shisinday went to sleep, Tarver, Phoebe, and James Peels went out to Shisinday's car. They saw blood and scratch marks on the passenger side, blood inside the car, blood pooled up inside the armrest area where the gun was, and bloody gloves on the dashboard. Phoebe went inside and argued with Shisinday. Shisinday decided to leave and on his way out said to Zendal, "[i]f I go down, you are going down with me because you are in this with me." Tarver

wrote down the license plate number of Shisinday's car and called the police as Shisinday drove away.

Detective Johnny Freeze arrived at the Peelses' and spoke with Zendal Peels. After talking with Zendal, Detective Freeze went to Harrison's residence and discovered that it had been burned. Inside, he found Harrison's purse containing her identification and the receipt for the fan belt. He also saw the new fan belt on her car. Shisinday was arrested around 1:00 a.m. July 19th, while seeking psychiatric treatment at John Sealy hospital at the University of Texas Medical Branch in Galveston ("UTMB"). A warrant was not issued until around 2:00 a.m., and Shisinday received a magistrate's warning shortly after 9:00 a.m. At approximately 9:45 a.m., a Montgomery County sheriff's deputy found Harrison's nude body submerged in the San Jacinto River.

Just after noon on July 19th, Detective Susan Nixon and Freeze transported Shisinday from the City of Galveston jail to the Harris County Jail. He repeated his dog story, but when interviewed at the jail, Shisinday told Freeze that he killed Harrison. From about 4:00 p.m. until 10:45 p.m., Shisinday gave a written statement to police confessing his involvement in the kidnapping and murder. He was still wearing the bloody clothes he wore while committing the offense. Shisinday directed police to the dumpster, where they found the victim's clothes, telephone, and other items from her house. Upon searching Shisinday's car, police discovered the packaging for a fan belt matching the fan belt receipt in Harrison's purse. They also found

a white and orange rope, blood on the passenger-side seat belt strap and buckle, and a .25 caliber handgun with dried blood on the barrel. DNA analysis established that the blood on Shisinday's gun matched Harrison's DNA profile. The odds that another person's blood would match were one in 5.7 billion.

Edward Bellas performed the autopsy on Sylvia Harrison. She had suffered multiple bruises to her body and face, defensive wounds on her hands, three non-fatal stab wounds to her face, and a fatal through-and-through gunshot to her head. The gunshot was not a contact wound but could have been made at close range. Her vaginal cavity was positive for sperm cells but, due to the degradation of the cells, DNA analysis could not be performed. Bellas determined that the rope still tied to her neck and ankles had been put there postmortem.

Procedural History

Shisinday was convicted of capital murder and assessed the death penalty for this offense on March 17, 1982. This Court affirmed the trial court's judgment[59] and later denied Shisinday's application for habeas corpus relief.[60] On July 2, 1997, the United States District Court for the Southern District of Texas granted Shisinday's application for habeas corpus and overturned his

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[59] *Thomas v. State*, 701 S.W.2d 653 (Tex. Crim. App. 1985).

[60] *Ex Parte Thomas*, 906 S.W.2d 22 (Tex. Crim. App. 1995), *cert. denied*, 518 U.S. 1021 (1996).

conviction based on Shisinday's forced medication during trial.[61] After the Attorney General filed an untimely appeal from the order reversing Shisinday's conviction, Shisinday filed a cross-appeal and a motion to dismiss the State's appeal as untimely. The Fifth Circuit Court of Appeals dismissed the State's appeal. The Attorney General then agreed in the Fifth Circuit Court of Appeals to a stipulation of dismissal in the federal habeas corpus proceedings and Shisinday agreed in this stipulation to dismiss his cross-appeal.[62] Shisinday was then retried, convicted, and sentenced to death again on September 2, 1998. It is from this conviction that he appeals today. He raises fifty-four points of error.

Points of Error

Pre-Trial

Double Jeopardy

In his thirty-ninth and fortieth points of error, Shisinday complains that his new trial was barred by double jeopardy and the stipulation agreeing to dismiss the federal habeas corpus proceedings in which Shisinday successfully challenged his first conviction. In the stipulation, the Attorney General, representing Gary Johnson, Director of the Texas Department of Criminal

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[61] *Thomas v. Johnson*, No. H-95-5236 (S.D. Tex. 1997) (not designated for publication).

[62] *Thomas v. Johnson*, No. 97-20770 (5th Cir. Oct. 30, 1997) (not designated for publication).

Justice-Institutional Division ("TDCJ"), agreed to release Shisinday from the Director's custody and agreed not to file a petition for rehearing in the Fifth Circuit or a petition for writ of certiorari in the United States Supreme Court. Nowhere does the stipulation bind the State of Texas from retrying Shisinday or prevent county authorities from taking Shisinday into custody.

Shisinday also argues that his current death sentence amounts to a second penalty for this crime because he has already served nineteen years in prison for the first conviction. Shisinday cites no authority supporting this proposition.[63] Because Shisinday's conviction was not reversed on the basis of insufficient evidence, there was no legal impediment to the State's retrying Shisinday for the offense.[64] Shisinday's thirty-ninth and fortieth points of error are overruled.

Motion for Continuance

In his fifty-fourth point of error, Shisinday complains that the trial court violated his Sixth and Fourteenth Amendment rights by denying his motion for a continuance to obtain court papers, factual records, and legal research necessary for Shisinday to participate in his defense. These documents, which Shisinday had been accumulating since his first conviction in 1982, were not

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[63] *See* TEX. R. APP. P. 38.1(h).

[64] *See Burks v. United States*, 437 U.S. 1, 14-15 (1978) (quoting *United States v. Tateo*, 377 U.S. 463, 465 (1964).

transferred with him from the penitentiary to the Harris County jail.

All motions for continuance must be sworn to by a person having personal knowledge of the facts relied on for the continuance.[65] Because Shisinday's motion was not sworn to, nothing has been presented for our review.[66] Shisinday's fifty-fourth point of error is overruled.

Insanity Defense

In his eleventh and twelfth points of error, Shisinday argues that the passage of time since his original trial prevented him from presenting an effective insanity defense at his new trial. Specifically, he contends that since his first trial his schizophrenia has gone into remission and that, as a result, the jury did not have the opportunity to observe the full effects of his illness. Had he not been forcibly medicated during his first trial and there not been such a delay in retrying him, Shisinday asserts that the jury would have been more receptive to his insanity defense.

To succeed on an insanity defense, Shisinday would bear the burden of proving that at the time he committed the offense he "did not know that his conduct was wrong."[67] Thus, the critical time

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[65] Art. 29.08.

[66] *See Montoya v. State*, 810 S.W.2d 160,176 (Tex. Crim. App. 1989), *cert. denied*, 502 U.S. 961(1991).

[67] TEX. PENAL CODE ANN. § 8.01.

to consider is the time of the offense. Shisinday's competency at the time of his second trial has no bearing on whether he was insane at the time of the offense.[68] As Shisinday states in his reply brief, "there was an enormous amount of evidence presented at Shisinday's 1998 trial concerning his mental illness, which established (1) that he suffered from paranoid schizophrenia, including delusions and other severe effects of that illness, in 1981 and 1982; and (2) that the illness, by 1998, was in remission." Shisinday presented testimony during the guilt/innocence phase from Dr. Robert Sarmiento who diagnosed Shisinday as "paranoid schizophrenic atypical" and whose 88 pages of testimony detail Shisinday's mental history. Sarmiento testified that, based on interviews and testing he conducted in 1982, he believed that Shisinday possibly did not know that his conduct was wrong on July 18, 1981. The delay between trials apparently did not prevent Shisinday from presenting evidence concerning his mental state at the time of the offense. We see no relevancy of Shisinday's demeanor at trial to his presentation of an insanity defense. Shisinday's eleventh and twelfth points of error are overruled.

Inability to Present Witnesses

Shisinday argues in his fifty-second and fifty-third points of error that the passage of time prevented him from presenting the testimony of key witnesses, thereby violating his due process and speedy trial rights. Specifically, Shisinday argues

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[68] *See Rodriguez v. State*, 899 S.W.2d 658, 665 (Tex. Crim. App. 1995), *cert. denied*, 516 U.S. 946 (1995).

that he was unable to call Ernest Gilliam and his wife, now both deceased, who could have related the true facts concerning Shisinday's purchasing the gun. But Shisinday does not say what "true facts" these witnesses could have relayed.

Additionally, Shisinday argues that Kathy Brown and John Butler could have testified about his difficult childhood and history of mental illness. Shisinday has not alleged why these witnesses were unavailable or what unique information they could have offered other than the defense's lengthy, detailed testimony concerning Shisinday's childhood and mental illness.

Shisinday argues that J.W. Smith and Mac Louther, two TDCJ employees, could also have offered mitigating evidence. Shisinday presented the testimony of numerous former and current employees of TDCJ who testified that Shisinday worked for more than ten years in the garment factory without violent incident and was a model employee and inmate. Shisinday fails to show that Smith and Louther's testimony would not have been cumulative.

Finally, Shisinday was unable to call his step-father, A.D. Belamy, now deceased, who submitted a sworn affidavit to the court concerning Shisinday's mother's alcohol problems and Shisinday's disoriented demeanor the day after the crime. The affidavit does not present any new information. Dr. Sarmiento testified at length during the punishment phase about Shisinday's "toxic" mother who was physically abusive and unstable. Dr. Cunningham also testified in detail about how

Shisinday suffered from extreme childhood neglect at the hands of his alcoholic, abusive mother.

Other than Gilliam, none of these witnesses Shisinday identifies testified during the first trial. Aside from the Gilliams and Bellamy, who are now deceased, there is no indication that the other witnesses were unavailable or unwilling to testify at his second trial. Because the alleged testimony would have been cumulative or immaterial, we cannot say that any alleged delay in itself affected Shisinday's due process and speedy trial rights. Shisinday's fifty-second and fifty-third points of error are overruled.

Void Indictment

The indictment charged Shisinday with capital murder and the lesser-included offenses of murder and kidnapping. If Shisinday were convicted of a non-capital offense, for enhancement purposes the indictment alleged two prior felony convictions of simple burglary and impersonating a police officer. In his eighteenth point of error, Shisinday alleges that the use of non-capital offenses for enhancement purposes rendered the indictment void. Shisinday did not raise this objection before the trial. Because this point was not preserved,[69] Shisinday's eighteenth point of error is overruled.

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[69] Art. 1.14(b).

Confession and Arrest

Shisinday's first two points of error concern the voluntariness and admissibility of his written statement. In his first point of error, Shisinday contends that his written statement was coerced and improperly admitted into evidence. In his second point of error, Shisinday argues that he did not voluntarily waive his *Miranda*[70] rights before making the written statement.

On November 10, 1998, the trial court conducted a *Jackson v. Denno*[71] hearing to determine whether Shisinday's written confession was voluntarily and knowingly made. The record of that hearing reveals that around 5 p.m. on July 18, 1981, Shisinday went to the emergency room of John Sealy Hospital in Galveston, Texas, seeking psychiatric help. Between 10 p.m. and 1 a.m. Dr. Kayla Paul, a psychiatric intern, conducted a psychiatric examination and history of Shisinday. Shisinday appeared coherent, did not appear to be under the influence of drugs or alcohol, understood the questions, and responded appropriately. But Dr. Paul noted that Shisinday appeared tired, anxious, and sad. Shisinday told her that someone had told him that he had committed a crime, but he, apparently could not recall the circumstances. Instead, he told her a story about killing a dog. Shisinday recounted meeting the victim the previous day and helping her with her car. Then he and his

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[70] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

[71] 378 U.S. 368, 376 (1964).

friend went to the victim's house for a beer. After leaving her house, Shisinday hit a dog with a car. He pulled the dog into his car and, noting that it was injured and suffering, shot the dog in the head. Fearing that the dog's owner would discover what he had done, Shisinday tied some rocks to the dog and dumped it in the San Jacinto river. Shisinday also reported that he had not slept in three days or eaten in two. But he contradicted this when he told Dr. Paul that, after his encounter with the dog, he went to his friend's house and slept until morning.

Dr. Paul further testified that on the night she examined Shisinday she received a call from Detective Nixon of the Harris County Sheriff's Department, ordering security guards to be posted outside Shisinday's hospital room to prevent him from leaving. Sergeant Ivan Isbell with the UTMB police arrested Shisinday at the hospital around 1:00 a.m. on July 19, 1981, and transported him to the Galveston jail. Around 2:00 a.m., a Harris County district judge signed a warrant for Shisinday's arrest for aggravated kidnapping. Detectives Nixon and Freeze delivered a copy of the warrant to the Galveston jail and around 4:00 or 5:00 a.m. went to the hospital to speak with Dr. Paul. Dr. Paul informed them of the location where Shisinday had described dumping the dog. The police found the victim's body in that location.

At around 9:00 a.m., Nixon and Freeze took Shisinday to Alta Loma to receive the magistrate's warnings and then returned him to the jail. After making arrangements to have Shisinday's car towed to Harris County, the detectives picked

Shisinday up from the jail around noon and took him to Hams County jail. On the way, Shisinday expressed to the detectives his fear that they or the police were going to beat him. He explained that guards and inmates at Angola prison in Louisiana had beaten him before and he was apprehensive about being beaten again. Nixon and Freeze assured Shisinday several times that he would not be beaten. During the drive, Shisinday told the detectives his story about the dog.

After they arrived in Houston and Shisinday was processed, he agreed to speak with Nixon in an interview room. Nixon did not repeat the *Miranda* warnings to Shisinday, but reminded him of the warnings that he had received from the magistrate. Shisinday repeated the dog story. When Nixon showed Shisinday pictures taken of the victim in the morgue, Shisinday burst into tears. Disgusted, Nixon terminated the interview and asked Freeze to take Shisinday to the jail located in the basement of the building. On the elevator, Shisinday told Freeze that he was ready to make a confession, and the two returned to the interview room. Shisinday's oral confession was transcribed between 4 p.m. and 10:30 p.m. The statement was nine pages long and took six hours to transcribe because Shisinday made numerous changes. Shisinday went so far as to correct a grammatical element in the standard form language. Shisinday read and initialed the *Miranda* warnings appearing at the top of the page and signed the original and five copies of the statement. Shisinday's only question related to the meaning of the word "intelligently" in the context of the form language following the *Miranda* warnings: ". . . I

knowingly, intelligently and voluntarily waive the rights set out above and make the following voluntary statement." Nixon explained that "intelligently" meant that he understood what he was saying and the consequences of making the statement. Shisinday responded that he did understand and wanted to make the statement. According to Nixon, Shisinday appeared to understand everything during the interview and articulated the details of the crime "extremely well."

During the interview, Shisinday was given clean clothes to wear because he was still wearing the clothes he had on during the offense, and the sweat and blood were beginning to emit a foul odor. Shisinday was also given food, drinks, and cigarettes, and had full access to the bathroom.

At the hearing, the defense presented the testimony of Dr. Robert Sarmiento, a psychologist who gave Shisinday several tests in 1981 and 1982. Dr. Sarmiento testified that Shisinday had an IQ of 91, in the low end of the average range, had a 4.7 grade level in reading and a 3.9 grade level in spelling. Shisinday's deficient academic achievements led Dr. Sarmiento to conclude that Shisinday had not developed these skills to his intellectual potential. Sarmiento also concluded that Shisinday suffers from fairly severe mental disorders, impairing his ability to make sound judgments and resulting in disturbed thought processes and disorganized thinking. After reviewing Shisinday's personal history, Sarmiento determined that Shisinday suffers from atypical paranoid schizophrenia. Sarmiento concluded that Shisinday's

mental disorders probably prevented his understanding the *Miranda* warnings and "quite likely" impaired his judgment to waive his rights. But on cross-examination Sarmiento admitted that he had no evidence to say with certainty that Shisinday did not understand the warnings before he confessed.

Shisinday argues that his confession was involuntary due to his mental illness, lack of sleep for three days and lack of food for four days, a lengthy interrogation, and threats to place him in the jail. He further argues that his credible fear of police violence rendered his confession inadmissible. Shisinday also asserts that he did not understand the *Miranda* warnings due to his mental incapacity and argues that the magistrate neither explained the warnings nor knew if Shisinday actually understood them.

"[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction."[72] When determining whether a defendant's will was overborne in a particular case, courts should assess the totality of all of the

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[72] *Id.*

circumstances surrounding both the characteristics of the accused and the details of the interrogation.[73]

In a suppression hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony.[74] In reviewing the trial court's decision whether to suppress a confession, an appellate court views the evidence in the light most favorable to the trial court's ruling and may not disturb supported findings of fact absent an abuse of discretion.[75] Accordingly, this Court addresses only whether the trial court properly applied the law to the facts.[76]

Based on the evidence adduced at the hearing, the trial court found that (1) Detectives Freeze and Nixon did not abuse, threaten, or promise Shisinday anything in order to coerce him to confess; (2) Shisinday was lucid and capable of understanding the warnings and nature of his statement; (3) Shisinday was not experiencing any hallucinations, delusions, mental illness, or sleep deprivation while giving his statement; (4) there is no evidence that the police sought to deprive Shisinday of food or sleep after his arrest or during his statement; and (5) Shisinday did not request an attorney or invoke his right to remain silent while

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[73] *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *State v. Terrazas*, 4 S.W.3d 720, 730 (Tex. Crim. App. 1999).

[74] *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990).

[75] *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

[76] *State v. Ballard*, 987 S.W.2d 889, 891 (Tex. Crim. App. 1999).

giving his statement. Accordingly, the court concluded that Shisinday's statement was freely and voluntarily made and was admissible under Articles 38.21 and 38.22.

The trial court's findings are supported by the record of the suppression hearing. Although Shisinday's psychological expert testified that Shisinday probably could not understand the warnings, evidence of the circumstances surrounding Shisinday's statement demonstrates otherwise. There was no indication that Shisinday did not understand the *Miranda* warnings – he inquired about the use of the word "intelligently," corrected a grammatical element in the standard form language, expressed his desire to make the statement, and then provided a lengthy, detailed statement to which he made numerous corrections. Indeed, it was Shisinday's repeated changes to the statement that apparently extended the transcription process. Further, Nixon testified that Shisinday was given food and drink when he requested it. Finally, it was during the car ride to Houston that Shisinday expressed his fear of being beaten, and both Nixon and Freeze assured him that he would not be harmed. After the car ride, Shisinday never raised that concern again.

Although Shisinday sought psychiatric help at the hospital after committing the crime, Dr. Paul noted that Shisinday was lucid and oriented. Shisinday's self-reported auditory hallucinations and out-of-body experiences had occurred in the past and, according to Shisinday, had not happened during commission of the crime.

Because the record does not indicate that Shisinday was unable to understand the *Miranda* warnings or that the State utilized coercive tactics designed to overbear Shisinday's will, we defer to the trial court's findings that Shisinday knowingly waived his rights and that his confession was both voluntary and admissible. Shisinday's first two points of error are overruled.

In his third through fifth points of error, Shisinday complains that his oral statements were inadmissible for the same reasons as his written statement and because the State gave no notice during the suppression hearing of its intention to introduce the oral statements. He further avers that they were admitted in violation of Article 38.22, § 3(c).

Specifically, Shisinday refers to statements that he made to Lieutenant Carl Borchers during his interrogation. Lieutenant Borchers testified during the guilt/innocence phase that he asked Shisinday whether he recognized some items (a blood-stained shirt and bra, stained panties, a telephone, and some glasses missing the lenses) that police investigators found in a dumpster. Shisinday did. Referring generally to the arguments made against admission of the written statement, defense counsel objected that the oral statements were also inadmissible because they were part of the same custodial interrogation.

Because Shisinday did not lodge an Article 38.22, § 3(c), objection as he does now, we will

not address this allegation.[77] Shisinday also failed to object on the basis that the oral statements were not part of the pre-trial suppression hearing. Indeed, counsel apparently considered that the oral statements were included in the suppression hearing, stating, "[W]e have had the pretrial hearing based on the admissibility of the oral statements, written statements and items that were seized from the defendant." Counsel was correct. Detective Nixon testified at the hearing that Lieutenant Borchers entered the interview room and showed Shisinday the items found in the dumpster. She further testified that Shisinday had referred to these items in the written statement and was the one who informed the police where the items could be found. Accordingly, we find that Shisinday has not preserved this argument for review.[78]

With respect to the preserved portion of his argument, we have already determined that Shisinday understood and knowingly waived his *Miranda* rights and that his written statement was not obtained through coercive State action. Therefore, we find no reason to suppress Shisinday's identification of the items retrieved from the dumpster that belonged to the victim. Shisinday's third, fourth, and fifth points of error are overruled.

In his sixth point of error, Shisinday argues that under the Fourth, Fifth, and Fourteenth Amendments his written and oral statements and the

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[77] *See* TEX. R. APP. P. 33.1(a)(1).

[78] *See id.*

items found in the dumpster should be suppressed because his warrantless arrest was illegal. Specifically, Shisinday contends that a warrant was required because he had an expectation of privacy in the emergency room of the hospital and that the police lacked probable cause to support an arrest because Zendal Peels, whose statements were the sole basis of the arrest, was not a credible witness. Shisinday does not argue that his warrantless arrest was illegal under Article 14 of the Texas Code of Criminal Procedure. Therefore, we address only his constitutional claims.

A warrant is not required when an arrest is supported by probable cause and is made in a public place where the arrestee lacks a reasonable expectation of privacy.[79] Although in this direct appeal, Shisinday now argues that he had a reasonable expectation of privacy in the emergency room, he did not make this argument in his motion to suppress. The accused must establish any personal Fourth Amendment privacy interest at the time of the trial court's "action" on the motion to suppress.[80] Because Shisinday did not timely present this argument at trial, it was not preserved.

With respect to his preserved argument, we find that there was sufficient probable cause to support Shisinday's warrantless arrest. Probable cause to arrest exists when the arresting officer has knowledge based on reasonably trustworthy

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[79] *United States v. Santana*, 427 U.S. 38, 42 (1976).

[80] *Calloway v. State*, 743 S.W.2d 645, 650 (Tex. Crim. App. 1988).

information that would warrant a reasonable and prudent person in believing that a particular person has committed or is committing a crime.[81]
Shisinday's arrest was based in part on the statement obtained from Zendal Peels recounting the events of July 17 and 18, 1981. Zendal Peels' statement to police, which was admitted only for purposes of the suppression hearing conducted outside the jury's presence, contradicted Shisinday's statement in various respects including who hit Harrison and initiated the kidnapping. According to Peels' statement, he had known Shisinday for about three weeks. Shisinday and his girlfriend were staying at the Peelses' trailer because they had been evicted from their apartment. That night, Zendal and Shisinday dropped off Doyle Peels and a friend at the skating rink. On the way home, they saw a woman with car trouble. Shisinday fixed the car, and they followed her home. She invited Zendal and Shisinday in for a beer. After a few minutes, they sent Zendal out to buy cigarettes and later sent him out again to buy beer. After Zendal returned the second time, he noticed that Shisinday and the victim were discussing sex. Shisinday told Zendal to wait outside for about an hour. After a while, Shisinday brought the victim out to the car. She was slung over his shoulder and appeared unconscious. Shisinday put her on the front floorboard of the car. Zendal became scared and started walking away from the car, but Shisinday pulled a gun on him and ordered him to return. Shisinday informed Zendal that he had raped the victim and needed to dispose of her body. He also

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[81] *Hawkins v. State*, 660 S.W.2d 65, 70 (Tex. Crim. App. 1983).

showed Zendal where the victim had bitten his finger. Shisinday and Zendal drove the victim to a wooded area. Along the way she awoke and began screaming, and Shisinday hit her on the temple with the gun. When she awoke again and started to scream, Shisinday pulled onto a dirt road. Zendal got out of the car and heard one gun shot. Shisinday had shot the victim in the head with a .25 caliber automatic. After Zendal returned to the car, they drove under a bridge. Shisinday ordered Zendal out of the car, disposed of the body, and then returned to pick up Zendal. The following morning, Zendal informed his father and stepmother of what had happened, and they called the police.

The information police received from Dr. Paul sufficiently corroborated Zendal's statement to support a finding of probable cause to arrest Shisinday. As noted above, Shisinday told Dr. Paul that his friend's mother had told him that he had murdered someone. He also told Dr. Paul about helping a stranded motorist and going to her home. His account of shooting a dog and disposing its body in the river coincided with Zendal's statement concerning the victim's fate. Therefore we find that Shisinday's warrantless arrest was not illegal. Shisinday's sixth point of error is overruled.

In his eighth point of error, Shisinday argues that the trial court erred by permitting introduction of the items recovered from his car because his car was searched and seized without a warrant and without probable cause. The sole basis for Shisinday's argument is that the police were not justified in arresting him and therefore had no

justification for seizing and searching the car. We have already determined, however, that Shisinday's arrest did not offend the Fourth Amendment. Further, Shisinday signed a consent to search his car just after completing his written statement, negating the need for a warrant.[82] Shisinday's eighth point of error is overruled.

In his forty-eighth point of error, Shisinday complains that the trial court should have admitted at the suppression hearing the report of Officer Rozell who was deceased at the time of the hearing. The report revealed statements Zendal Peels made concerning his role in the crime that were inconsistent with another statement Zendal had given to police downplaying his involvement in the murder. Consequently, Shisinday argues that the report was relevant to show that Peels was an unreliable source of information and could not be used to establish probable cause. The State argues that this was inadmissible hearsay.

As a general rule hearsay is admissible during a suppression hearing to show probable cause.[83] But only the officers) who obtained the evidence which led them to conclude that there was probable cause to arrest a suspect can testify as to

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[82] *See Carmouche v. State*, 10 S.W.3d 323, 331(Tex. Crim. App. 2000) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)).

[83] *See Cambell v. State*, 910 S.W.2d 475, 479-80 (Tex. Crim. App. 1995), *cert. denied*, 517 U.S. 1140 (1996); *Murphy v. State*, 640 S.W.2d 297, 299 (Tex. Cr. App. 1982).

how they reached that determination.[84] At the suppression hearing, the State called Detective Nixon and Detective Freeze, who were the primary investigators of this crime. The record reflects that Nixon and Freeze were the individuals who prepared the offense report after Shisinday was located, drew up a warrant, and had the warrant signed based on probable cause. Officer Rozell was the first officer to arrive at the Peeles' and talk to Zendal. At the suppression hearing both Nixon and Freeze testified as to what Rozell had told them. As for Rozell's report, the record does not indicate whether Nixon and Freeze even had this report before they determined that there was probable cause to arrest Shisinday. If they did not have the report, the information contained in it would be irrelevant for purposes of determining if Nixon and Freeze had probable cause. Its exclusion would thus not be improper.

Even if Nixon and Freeze had the report at the time of the arrest, Shisinday still cannot show that he was harmed by the trial court's failure to admit it. Shisinday argues that this report demonstrates that Zendal had conflicting stories and was therefore an unreliable source to rely on for probable cause. But Rozell's report does not conflict with the oral and written statements Zendal gave Nixon and Freeze before Shisinday was arrested on July 19th (between 12:00 a.m. and 1:00 a.m.) Zendal did not change his story until July 20 – after Nixon

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[84] *See Cambell v. State*, 910 S.W.2d at 479-80; *McVickers v. State*, 874 S.W.2d 662, 665-66 (Tex. Crim. App. 1993).

and Freeze had determined that there was probable cause to arrest Shisinday. Therefore, Shisinday's forty-eighth point of error is overruled.

Shisinday contends in his seventh point of error that the trial court's failure to conduct the suppression hearing before trial violated his due process rights. Specifically, he argues that the court waited until after six witnesses testified and various exhibits were introduced – including the murder weapon and photographs of items removed from Shisinday's car – to conduct the suppression hearing. According to Shisinday, some of the testimony and exhibits would not have been admissible had the court granted the motion to suppress. Therefore, Shisinday contends that the court had an interest in denying the suppression motion, because granting the motion would have resulted in a mistrial, with double jeopardy concerns perhaps barring further prosecution.

Shisinday does not specify what testimony or other exhibits would have been excluded had the court granted the motion to suppress, other than the gun and pictures of the car. Article 28.01 leaves to the trial court the discretion whether to hold a pretrial hearing to suppress evidence.[85] Even if Shisinday could establish that the trial court abused its discretion in holding the hearing after the trial began, Shisinday has not demonstrated how the timing of the hearing harmed him. As noted above, Shisinday has not established that his car was

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[85] *See Calloway v. State*, 743 S.W.2d at 649.

illegally seized or searched. And the facts surrounding the seizure and search of his car were not well developed at the suppression hearing. Because Shisinday has not demonstrated that the items seized from the car were inadmissible, we cannot see how Shisinday was harmed by admitting the gun and the photographs of those items seized from his car, irrespective of when the hearing was conducted. Shisinday's seventh point of error is overruled.

Trial – Guilt/Innocence

Voir Dire

In his thirty-first point of error, Shisinday contends that the trial court erred by failing to quash the first jury panel after reading them an abandoned aggravated rape charge in the indictment. Shisinday complains that he was deprived of a fair and impartial jury because three members of this tainted panel served on the jury. The paragraph Shisinday complains of read as follows:

> It is further presented that in Harris County, Texas, Danny Dean Thomas, hereafter styled the defendant, heretofore, on or about July 18, 1981, did then and there unlawfully, while in the course of committing and attempting to commit the felony of aggravated rape of Sylvia Elaine

> Harrison, hereafter styled the complainant, intentionally cause the death of the complainant by shooting the said complainant with a gun.

After the court finished reading the indictment and general instructions to the jury, defense counsel moved to quash the jury panel because the rape charge had been dismissed 17 years earlier and would inflame the jury. The trial judge denied the motion and informed counsel that he would afford counsel additional peremptory strikes "to make up for it." The court also re-read the correct murder-in-the-course-of-kidnapping charge, to each prospective juror during individual voir dire.

Shisinday argues that re-reading the correct indictment was insufficient to correct the error and confused the jurors because it could not eliminate the stigma of the rape charge. Shisinday further contends that the abandoned charge was particularly prejudicial because the State made rape a "theme" of the trial and emphasized it at closing arguments.

In essence, Shisinday is arguing that the three tainted jurors should have been excluded from the jury. Although the court offered Shisinday the remedy of additional strikes to remove these jurors, Shisinday failed to exercise his available strikes. In fact, he did not even have to request additional strikes because he used only eleven of his original fifteen strikes. Therefore, Shisinday has not preserved error. Shisinday's thirty-first point of error is overruled.

In his thirty-sixth point of error, Shisinday argues that the State's voir dire interviews deprived him of a fair trial and due process because the State inaccurately explained to the venire the terms "deliberate" and "intentional" and the trial court did not define these terms in the charge. Shisinday cites to the voir dire examination of veniremember Keith Barker as an example of the prosecutor's alleged improper voir dire. Because Shisinday cites to no other instances in the record, we limit our consideration only to Barker's voir dire.[86]

Shisinday has waived this allegation because he did not make a contemporaneous objection at trial with respect to the State's discussion of "intentional" and "deliberate" with veniremember Barker.[87] And Shisinday has not pointed us to any other place in the record where he might have lodged such an objection. Shisinday's thirty-sixth point of error is overruled.

Shisinday complains in his thirty-seventh point of error that he was denied due process and a fair trial when the prosecutor improperly instructed veniremember Barker on voir dire to consider the victim when answering the mitigation special issue. He further contends that the State violated his rights by informing Barker that some people might consider a defendant's youth and mental abilities to be mitigating while others might not. Because Shisinday did not object to the State's

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[86] *See* TEX. R. APP. P. 38.1(h).

[87] *See* TEX. R. APP. P. 33.1(a).

discussion of youth and mental abilities with Barker, he has not preserved this allegation for review.[88]

With respect to Shisinday's allegation concerning the prosecutor's requesting Barker to consider the victim, the following colloquy is relevant:

> Q. Now, I understand your concern about people not making decisions on emotions.
>
> A. Yes.
>
> Q. But I just want to make sure that not lost in that is the fact that obviously there is a victim in this case.
>
> A. Oh, yes.
>
> Q. Someone has already given up their life.
>
> A. Right.

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[88] *See id.*

Shisinday objected that the special issues must be based not on emotion but on the evidence presented, and the court agreed. The prosecution explained, however:

> I did not address any question to this venireman concerning whether or not he would answer any of these questions based on emotion. I only suggested to the venireman that during the course of the trial that there was a victim involved.

The court agreed, stating, "Yes, he is allowed to consider that. He said he would. It is not based on emotion but he acknowledged that it could be an emotional case."

In *Payne v. Tennesse*, the Supreme Court recognized that:

> The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.

In *Mosley v. State*, we observed that in Texas such victim-impact and character

evidence is relevant to the mitigation issue.[89] Thus, it was not improper for the prosecutor to remind Barker to consider the victim when answering the mitigation special issue. We agree with the trial court that the prosecutor was not trying to convince Barker to answer the mitigation issue based on emotion, but instead was reminding him to remember the victim. Shisinday's thirty-seventh point of error is overruled.

In his thirty-eighth point of error, Shisinday argues that prospective juror Jera K. Simpson was wrongly excused based on her opposition to the death penalty. But the State did not challenge this veniremember for cause. Instead, the State exercised a peremptory challenge against this witness without comment, as it was entitled to do.[90] Shisinday's thirty-eighth point of error is overruled.

Improper Exclusion of Evidence

In his twenty-first and twenty-second points of error, Shisinday argues that he was denied the right to confront Zendal Peels, who had invoked his right against self incrimination. The court did not permit Shisinday to call Zendal as a witness or to comment on his absence.

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[89] 983 S.W.2d 249, 264-272 (Tex. Crim. App. 1998), *cert. denied*, 526 U.S. 1070 (1999).

[90] *See Garcia v. State*, 919 S.W.2d 370, 395 (Tex.. Crim. App. 1996); *Tennard v. State*, 802 S.W.2d 678, 682 (Tex. Crim. App. 1990); *cf. Casarez v. State*, 913 S.W.2d 468, 295-96 (Tex. Crim. App. 1995).

Zendal informed the court outside the jury's presence that he would invoke his Filth Amendment privilege against self incrimination if called as a witness. Zendal's assertion of his Fifth Amendment right overrode Shisinday's constitutional right to compulsory process of witnesses.[91] Therefore Shisinday was not entitled to call Zendal to testify.[92] Shisinday's twenty-first and twenty-second points of error are overruled.

Improper Admission of Evidence

Shisinday's first conviction was reversed in a federal habeas corpus proceeding because he was forcibly medicated during his trial which violated his due process rights.[93] In his tenth point of error, Shisinday complains that his due process right to confront witnesses was violated when testimony from this first trial was introduced at his new trial. Shisinday contends that due to his involuntary subjection to antipsychotic medication, which induced him to sleep during substantial portions of his first trial, he was prevented from confronting the State's witnesses. He argues, therefore, that he was once again deprived of his right to confront a State's witness when the court allowed the testimony of Ernest Gilliam, who was deceased at the time of

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[91] *See Bridge v. State*, 726 S.W.2d 558, 567 (Tex. Crim. App. 1986).

[92] *See, e.g., id.*; *Ellis v. State*, 683 S.W.2d 379, 382 (Tex. Crim. App. 1984).

[93] *Thomas v. Johnson*, H-95-5236 (S.D. Tex. July 2, 1997) (citing *Riggins v. Nevada*, 504 U.S. 127 (1992)).

Shisinday's second trial, to be read into the record. Gilliam's testimony linked Shisinday to the purchase of the murder weapon.

Gilliam's testimony, which is less than four pages long, revealed that he had sold the .25 caliber gun to Shisinday for $50. There was other evidence that linked Shisinday to the gun – the gun was found covered in blood in Shisinday's car, other witnesses testified that the gun used in the murder belonged to Shisinday, and Shisinday confessed to shooting the victim with that gun. We need not determine whether admission of Gilliam's testimony violated Shisinday's Sixth Amendment right to confront this witness because the testimony was cumulative and did not contribute to Shisinday's conviction.[94] Shisinday's tenth point of error is overruled.

Shisinday argues in his thirteenth and fourteenth points of error that blood scrapings taken from the murder weapon were not properly authenticated and that their admission was reversible error. At trial, the State introduced evidence that a gun with serial number 132,143 was seized from Shisinday's car, sealed in an envelope, and taken to the Department of Public Safety ("DPS") laboratory in Austin. Sandra Budge with the DPS crime lab testified that in 1981 she attempted to type the blood found on the gun but was unable to do so. She further explained that DNA analysis was not

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[94] *See* TEX. R. APP. P. 44.2.

available at that time. Then the State asked Budge the following questions:

Q: Now, let me show you what's been marked as State's Exhibit 100. Do you recognize the contents of 100?

A: Exhibit 100 is given the unique case number that was assigned to this case.

Q: And is that something had contained evidence regarding some blood scrapings from Lab No. 155,287 regarding a pistol with serial number 132,143?

A: Yes, ma'am.

Q: Now, on that envelope is there any type of initial at the time of who did the scraping, who performed the scrapings of this substance? Is there any type of initial of who actually was the one to take the scrapings from the weapon?

A: I don't see one, no.

Q: Okay. But this would have been something – it does have the unique lab number of L-155,287?

A: Yes, ma'am.

Q: And it would have been held at the crime lab in the vault?

A: Yes, ma'am.

Q: Under that case number?

Q. Yes, ma'am.

The State then called Kathleen Corrado, a DNA analyst with the DPS crime lab, who testified that her supervisor had instructed her to extract DNA from State's Exhibit 100. At this point, the State offered State's Exhibit 100 into evidence. The defense asked Corrado a few questions on voir dire concerning how she obtained the evidence she tested, and then the State again offered State's Exhibit 100 into evidence. The defense objected, "To 100 we object for the reason that there is no predicate as to who did whatever was done with this – who put this evidence in this paper bag here and we object to all of the hearsay contained on State's Exhibit No. 100." Written on the exhibit was "blood scrapings from barrel of .25 caliber pistol." After the exhibit was admitted, Corrado confirmed that she did not know who had scraped the blood from the gun and placed it into the envelope.

The State argues that Shisinday has waived this allegation for failing to object when Budge first attempted to identify the contents of State's Exhibit 100 as blood scrapings. But it is not clear that Budge's affirmative answer to the prosecutor's question, "And is that something had contained [*sic*] evidence regarding some blood scrapings from Lab No. 155,287 regarding a pistol with serial number 132,143?" actually identified the contents of Exhibit 100 as blood scrapings. Further, in her answer to the next question Budge revealed

that there was no indication of who performed the scrapings. The State waited until Kathleen Corrado testified to offer Exhibit 100 into evidence, and Shisinday objected at that time. Accordingly, Shisinday's objection to admission of Exhibit 100 was not untimely. And, although inartfully stated, we find defense counsel's objection was sufficient to put the trial court on notice that the proper predicate had not been laid to establish who took the blood scrapings from the gun.[95]

Rule of Evidence 901(a) provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." One method of providing such evidence is through the "testimony of a witness with knowledge."[96] But the two witnesses who testified regarding Exhibit 100 did not know who had scraped blood from the gun, placed the scrapings in the envelope, and written "blood scrapings from barrel of .25 caliber pistol." Thus, the only predicate laid to establish that Exhibit 100 was blood scrapings taken from the gun was Corrado's assumption based on the hearsay writing. Accordingly, we find that the court's admission of Exhibit 100 was an abuse of discretion.[97]

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[95] *See* TEX. R. APP. P.33.1(a)(1)(A).

[96] TEX. R. EVID. 901(b)(1).

[97] *See Angleton v. State*, 971 S.W.2d 65 (Tex. Crim. App. 1998).

But the admission of this evidence did not affect Shisinday's substantial rights.[98] There was significant evidence at trial establishing Shisinday's gun as the murder weapon. Martha Ann Tarver recognized the .25-caliber weapon as Shisinday's gun. A few hours after the murder, she saw the gun resting in a pool of blood in the armrest of Shisinday's car. Detective Olive seized the gun from Shisinday's car and observed dried blood on the barrel. Most significantly, Shisinday admitted in his written statement to shooting the victim point blank in the head with the gun. Given this evidence, we hold that admission of the blood scrapings could not have had "a substantial and injurious effect or influence in determining the jury's verdict."[99] Shisinday's thirteenth and fourteenth points of error are overruled.

In his nineteenth point of error, Shisinday argues that admission of duplicative photos inflamed the jury. He contends that because the photos were more prejudicial than probative, their admission violated Rule of Evidence 403. Specifically, Shisinday complains of State's Exhibits 33, 69-71, 84-86, 88, 90, 92.

We must determine whether admission of the photograph constitutes an abuse of discretion under Rule 403.[100] Rule 403 favors the admission of

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98 *See* TEX. R. APP. P. 44.2(b).

99 *Jackson v. State*, 17 S.W.3d 664, 672 (Tex. Crim. App. 1999).

100 *Montgomery v. State*, 810 S.W.2d 372, 391(Tex. Crim. App. 1990) (op. on reh'g).

relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial.[101] In determining whether the probative value of photographs is substantially outweighed by the danger of unfair prejudice, a court may consider several factors including the number of exhibits offered, their gruesomeness, their detail, their size, whether they are black and white or color, whether they are close-up, whether the body depicted is naked or clothed, and the availability of other means of proof and the circumstances unique to each individual case.[102] Generally, a photograph is admissible if verbal testimony as to matters depicted in the photographs is also admissible.[103]

Shisinday has forfeited this point of error with respect to Exhibits 69-71. In his brief, he challenges these photos as duplicative and overly prejudicial. At trial, however, he objected only that Exhibits 69-71, photos of Shisinday's car, were inadmissible as the product of an illegal search and seizure. Because this alleged error is not supported by a comporting objection at trial, we decline to address it.[104]

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[101] *See Long v. State*, 823 S.W.2d 259, 271(Tex. Crim. App. 1991), *cert. denied*, 505 U.S. 1224 (1992).

[102] *Chamberlain v. State*, 998 S.W.2d 230, 237 (Tex. Crim. App. 1999), *cert. denied*, 120 S. Ct. 805 (2000).

[103] *See Long*, 823 S.W.2d at 271-72 n.18.

[104] *See Barnes v. State*, 876 S.W.2d 316, 325 (Tex. Crim. App.), *cert. denied*, 513 U.S. 861(1994).

State's Exhibit 33 is an autopsy photo of Sylvia Harrison's face. The approximately three-by-five-inch photo shows extensive bruising on her cheek and eyelids and depicts the rope still tied around her neck. The State introduced this photo through the testimony of Harrison's aunt to identify the person in the autopsy photo as Sylvia Harrison. The pathologist, Dr. Edward Bellas, testified that the gunshot wound through Harrison's head caused the telltale black eyes. He also testified that she had suffered bruises and three stab wounds to the face. Because the photo was introduced to establish the victim's identity and depicted only the wounds Shisinday inflicted, the trial court did not abuse its discretion in finding this photo more probative than prejudicial.[105]

Exhibits 84-86, 88, 90 and 92 are three-by-five autopsy photographs of Harrison's neck after the rope was removed, and her face, ankle, arm, hand, and finger, showing the various injuries she suffered during the kidnapping, murder and disposal of her body. Not only did the pathologist's testimony describe these wounds, but the photos also served to corroborate Shisinday's statement concerning his and Zendal's efforts to push Harrison into the car and overwhelm her during the periods in which she would regain consciousness. Further, the photos are not duplicative. Each one depicts a separate injury. The court excluded Exhibits 87, 89 and 91, which were additional autopsy photos. The photos show only

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[105] *See Santellan v. State*, 939 S.W.2d 155, 172 (Tex. Crim. App. 1997).

what Shisinday and Zendal did to the victim, and testimony concerning the wounds she suffered was admissible. Therefore, the trial court did not abuse its discretion in permitting their admission. Shisinday's nineteenth point of error is overruled.

Shisinday argues in his twentieth point of error that an extraneous bad act was improperly admitted during the guilt/innocence phase of trial. Specifically, he refers to the incident earlier on the night of the murder in which Shisinday pulled out his gun and pointed it at a police officer stopped next to them at a red light. Doyle Peels and Ronald McHenry testified that Shisinday pulled the gun out of the armrest, waved it around, pointed it at the police officer, asked if he should shoot the officer, and eventually returned the gun to the armrest. Although Shisinday lists Rules of Evidence 401, 403, and 404(b) , as bases for challenging this evidence, his objection at trial that the evidence was not relevant and "its prejudicial and inflammatory nature outweighs that relevance" involves only Rules 401 and 403.

The State argues that the evidence was relevant and probative to demonstrate Shisinday's exercising control and possession of the weapon before the murder. In *Ransom v. State*, we held that the trial court did not abuse its discretion in admitting evidence that Ransom had burglarized a vehicle to obtain the gun he used in the primary murder.[106] We noted that the challenged evidence

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[106] *Ransom v. State*, 920 S.W.2d 288, 300-01 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1030 (1996)).

was relevant to demonstrate Ransom's ownership of the gun and that the "trial court was justified in concluding that the jury would not be swayed to convict [the defendant] of capital murder on the basis of the comparatively minor offense of burglary of a motor vehicle."[107] We invoke the same reasoning here. Shisinday's removing the gun from his armrest, pointing it at the officer, waving it around at the other passengers in the car, and returning it to the armrest demonstrated Shisinday's ownership and control of the murder weapon. Thus, this evidence served to corroborate Shisinday's admission in his written statement that he was the one who shot Harrison. The probative value was not "substantially outweighed by the danger of unfair prejudice."[108] Accordingly, we hold that the trial court did not abuse its discretion in admitting the extraneous-offense evidence.[109] Shisinday's twentieth point of error is overruled.

In his thirtieth point of error, Shisinday argues that admission of testimony implying that Harrison may have been raped, an offense not charged in the indictment, violated Rules of Evidence 401 and 403. Specifically, he challenges the testimony of Dr. Bellas, the medical examiner, and Kathleen Corrado, a DPS DNA analyst, concerning swabs taken from the victim's mouth, vagina, and anus, and the discovery of seminal fluid in the

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[107] *Id.*

[108] TEX. R. EVID. 403.

[109] *See Lane v. State*, 933 S.W.2d 504, 521(Tex. Crim. App. 1996).

vaginal cavity. The defense did not object to this testimony and stated that it had no objection when the State moved to admit the slides prepared from the swabs. Because he has not preserved this issue for appellate review,[110] we overrule Shisinday's thirtieth point of error.

Factual Insufficiency

Shisinday contends in his fiftieth point of error that the admissible evidence was factually insufficient to establish his guilt of the charged crime. He argues that without his "involuntary, coerced statement, as well as any 'fruits' of Shisinday's warrantless arrest, such as items found in Shisinday's car," the State could not prove that Shisinday was guilty of capital murder beyond a reasonable doubt.

We have overruled Shisinday's points of error challenging the legality of Shisinday's statement and the fruits of his arrest. Additionally, in addressing the legal sufficiency of the evidence to support a defendant's conviction, we review all evidence before the jury – whether properly or improperly admitted.[111] We explained this rule in *Thomas v. State*:[112]

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[110] TEX. R. APP. P. 33.1(a)(1)(A).

[111] *Dewberry v. State*, 4 S.W.3d 735, 740-41 (Tex. Crim. App. 1999); *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993).

[112] 753 S.W.2d 688, 695 (Tex. Crim. App. 1988).

> In the event a portion of this evidence was erroneously admitted, the accused may complain on appeal of such error. If his complaint has merit and the error is reversible, . . . a new trial should be ordered. But jurors do not act irrationally taking such evidence into account, since they are bound to receive the law from the trial judge. All evidence which the trial judge has ruled admissible may therefore be weighed and considered by the jury, and a reviewing court is obliged to assess the jury's factual findings from this perspective.

We see no reason why this rule should be different for a factual sufficiency review. Because Shisinday does not claim that the evidence is insufficient to support his conviction when all the evidence is taken into account, we need not address this claim. Shisinday's fiftieth point of error is overruled.

Improper Jury Argument

In his twenty-third and twenty-fourth points of error, Shisinday contends that the State improperly commented on Shisinday's failure to testify. Specifically, Shisinday refers to the following argument by the prosecutor:

> They talk about where is the ballistics evidence from the gun when you know from the statement, the uncontradicted statement of the defendant, that after all of this happened he went –

DEFENSE: Object to being a comment on the defendant's failure to testify.

THE COURT: Sustain your objection.

STATE: When I say the uncontradicted that means there has not been in any statement as to anything of what is meant –

DEFENSE: Further object. Another comment on the defendant's failure to testify.

The court sustained the objection, granted defense counsel's request to disregard the prosecutor's last comment, and overruled the request for mistrial.

A comment upon a defendant's failure to testify violates the Fifth Amendment of the United States Constitution[113] and Article 38.08. A prosecutor's comment will be found to violate the accused's right to silence if it is of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify.[114] An argument comments on the defendant's failure to testify if the defendant's testimony would

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[113] *Griffin v. California*, 380 U.S. 609, 615 (1965).

[114] *See Griffin*, 380 U.S. at 613-614; *Ramos v. State*, 419 S.W.2d 359, 367 (Tex. Crim. App. 1967) (citing *Davis v. United States*, 357 F.2d 438 (5th Cir. 1966), *cert. denied*, 385 U.S. 927 (1966); *Johnson v. State*, 611 S.W.2d 649, 650 (Tex. Crim. App. 1981).

be the only method of rebutting the evidence the prosecutor argues is uncontroverted.[115]

Here, defense counsel cut off the prosecutor before he could articulate what the uncontroverted testimony was. It is not possible to determine from the record, therefore, whether Shisinday's testimony would have been the only source of rebutting evidence. Therefore, because the argument did not direct the jury's attention to any specific uncontroverted evidence, there was no comment on his failure to testify. Additionally, the court's instruction to disregard was sufficient to cure any error.[116] Shisinday's twenty-third and twenty-fourth points of error are overruled.

Shisinday argues in his twenty-sixth point of error that the State went beyond the scope of permissible jury argument. During final argument, the State suggested that Shisinday's mother may have moved the pistol:

> STATE: And you know why wasn't the gun back in the armrest? Who was the last person to have driven that car? The defendant's mother . . . Maybe she took it

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[115] *See Myers v. State*, 573 S.W.2d 19, 20-21(Tex. Crim. App. [Panel Op.] 1978).

[116] *See Moore v. State*, 999 S.W.2d 385, 405 (Tex. Crim. App. 1999), *cert. denied*, 530 U.S. 1216 (2000); *Smith v. State*, 919 S.W.2d 96 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1030; *Jackson v. State*, 745 S.W.2d 4,13-15 (Tex. Crim. App. 1988); *cert. denied*, 487 U.S. 1241 (1988).

out of where it always was and he always keeps it back there under that armrest and put it under the carpet. I don't know.

DEFENDANT: Objection, Your Honor. Way outside the record.

STATE: Reasonable deduction.

COURT: Ladies and gentlemen, the lawyers' argument [*sic*] are not evidence. You may draw deductions.

To preserve a question for appellate review, the complaining party must obtain an adverse ruling from the trial court.[117] An ambiguous response, such as "the jury will recall the evidence," is not a ruling on the objection and is insufficient to preserve error.[118] Shisinday did not preserve this point for review. Point of error twenty-six is overruled.

Charge Error

In his ninth point of error, Shisinday argues that he was entitled to an instruction under Article 38.23 because of the conflicting facts regarding admissibility of the items seized as a result of his statement and search of his car.
Article 38.23(a) provides that in "any case where the legal evidence raises an issue hereunder, the jury

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[117] TEX. R. APP. P. 33.1(a)(2).

[118] *DeRusse v. State*, 579 S.W.2d 224 (Tex. Crim. App. 1979).

shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained." Citing to *Atkinson v. State*,[119] Shisinday argues that the trial court must submit such an instruction to the jury when the facts surrounding the legality of how the evidence was obtained conflict. Shisinday states that he timely requested a charge, directing us to the following record cite: "Exh. 31; SCR at 32-37." We presume that "Exh. 31" refers to exhibit 31. But State's exhibit 31 is a photograph of a doorway, and no defense exhibit 31 exists. Also, no such exhibit has been included with the briefs. At pages 32-37 of the Supplemental Clerk's record we find a *pro se* motion by Shisinday to impanel a special jury before trial to determine the voluntariness of his statement. The motion makes no mention of a jury charge or even of the items seized from Shisinday's car. The tables of contents of the clerk's record and supplemental clerk's record do not include a request for the jury instruction Shisinday now describes. Because Shisinday's brief fails to provide record support demonstrating that he indeed made such a request and that the request sufficiently called the trial court's attention to the omission in the charge, we find this point inadequately briefed under Texas Rule of Appellate Procedure 38.1(h).[120] Shisinday's ninth point of error is overruled.

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[119] 923 S.W.2d 21(Tex. Crim. App. 1996).

[120] *See Chapman v. State*, 921 S.W.2d 694, 695 (Tex. Crim. App. 1996).

In his fifteenth point of error, Shisinday argues that his written statement established a mistake-of-fact defense; therefore the trial court erred in refusing to submit to the jury a mistake-of-fact instruction consistent with Section 8.02(a) of the Texas Penal Code. In support of his argument, he refers to the passage in his statement that he thought the victim was dead after Zendal Peels hit her with the gun because the blood was "coming down on her head." According to the statement, Zendal and Shisinday then removed the victim from her house and put her in the car. Shisinday argues that, if he believed the victim were dead, then he could not form the requisite intent to commit the underlying offense of kidnapping. But the following page of his statement belies this alleged mistake-of-fact defense. Shisinday goes on to explain that, while in the car, the victim regained consciousness several times and started to cry. Shisinday therefore must have known during the course of the kidnapping that she was still alive. Because the record does not support Shisinday's purported mistake-of-fact defense, the trial court did not err in refusing to submit the issue to the jury. Shisinday's fifteenth point of error is overruled.

Shisinday argues in his sixteenth and seventeenth points of error that the jury was improperly instructed regarding the law of parties in violation of his Fifth and Fourteenth Amendment due process rights. He contends that the State did not notify him of its intent to pursue a parties theory and that such a theory was neither included in the indictment nor developed at trial.

We have consistently held that "if the evidence supports a charge on the law of parties, the court may charge on the law of parties even though there is no such allegation in the indictment or information."[121] Further, when the evidence supports both primary and party theories of liability, the trial court does not err in submitting a parties instruction.[122] Here, the evidence established that both Zendal Peels and Shisinday were involved in kidnapping Harrison and disposing of her body. Therefore, the evidence supports a finding that Shisinday acted both as a principal and a party to Zendal's conduct.[123] Accordingly, the court did not err by including a parties instruction in the charge. Shisinday's sixteenth and seventeenth points of error are overruled.

Punishment

Insufficient Evidence

In his thirty-third point of error, Shisinday argues that the evidence was legally insufficient to support the jury's affirmative answers to the deliberateness and future dangerousness special issues.[124] In his thirty-fourth point of error,

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[121] *Tate v. State*, 811 S.W.2d 607, 607 n.3 (Tex. Crim. App. 1991); *see Rico v. State*, 707 S.W.2d 549, 551(Tex. Crim. App. 1983).

[122] *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1030 (1996).

[123] *See Cordova v. State*, 698 S.W.2d 107,111 (Tex. Crim. App. 1985), *cert. denied*, 476 U.S. 1101 (1986).

[124] *See* 37.0711, §§ 2(b).

he argues that the jury's negative answer to the mitigation special issue was "against the great weight of the evidence."[125]

Under the first punishment issue, the jury was asked "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result." The second special issue asked "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[126] The State had the burden of proving the punishment issues beyond a reasonable doubt.[127] In its determination of the issues, the jury was entitled to consider all of the evidence presented at both the guilt/innocence and punishment stages of trial.[128]

At the punishment phase, the State introduced several penitentiary packets with judgments showing Shisinday's 1973 Texas conviction and thirty-day sentence for aggravated assault of a police officer, 1974 Texas conviction and three-year sentence for impersonating an officer, 1974 Florida convictions for misdemeanor attempted grand larceny and misdemeanor petit larceny

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[125] *See* 37.0711, §§ 2(e).

[126] Art. 37.0711, § 2(b)(1) and (2).

[127] Art. 37.0711, § 2(c).

[128] *Ladd v. State*, 3 S.W.3d 547, 557 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1070 (2000).

carrying sentences of four months and sixty days respectively, and 1976 Louisiana convictions and two-and-a-half year sentences for "simple burglary" and attempted escape.

Dr. Kayla Paul, the psychologist who examined Shisinday on the day after the murder, testified that Shisinday's school records indicated that Shisinday had run away from home several times, had been involved in fights, used weapons, had been cruel to animals and people, and had set fires. She further testified that Shisinday came from a chaotic and abusive home environment.

Although Shisinday had worked for more than ten years in the prison garment factory, mostly without incident, he had lost work privileges for possession of contraband, threatening an officer, and disobeying an order.

We must view all of the evidence in the light most favorable to the jury's answers and then determine whether a rational jury could have found beyond a reasonable doubt that the answer to the first two punishment issues was "yes."[129]

Here, a rational jury could have found beyond a reasonable doubt that the circumstances of the crime alone were sufficient to support the jury's affirmative answers to the deliberateness and future dangerousness special issues.[130] Shisinday

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[129] *Id.* at 558.

[130] *See Bell v. State*, 938 S.W.2d 35, 41-42 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 827 (1997).

kidnapped a nineteen-year-old woman from her home, shot her point blank in the head, tied cinder blocks to her body, and dumped her in the river. To cover up the crime, Shisinday wiped away the footprints leading to the river, disposed of the victim's clothes and personal items in a dumpster, and washed the inside and outside of his car to remove the blood.

Further, Shisinday carried a loaded gun in his car and, on at least one occasion, did not hesitate to point it a police officer and at a friend. Shisinday's school records also demonstrated a history of misbehavior – bringing razor blades and knives to school, putting hot matches on children's arms, bringing baby birds to school and killing at least one of them, and slapping a school psychologist and then attacking him with a croquet mallet. Shisinday's antisocial tendencies continued as he committed several crimes in the seventies. Viewing the evidence in the light most favorable to the jury's affirmative answers to the special issues, we hold that a rational jury could have found beyond a reasonable doubt that Shisinday committed this crime deliberately and would commit future violent acts.

With respect to Shisinday's thirty-fourth point of error, this Court has stated that it will not conduct a sufficiency review of the jury's finding on the mitigation special issue because we leave this value judgment to the jury's discretion.[131]

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[131] *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999).

Shisinday's thirty-third and thirty-fourth points of error are overruled.

Improper Exclusion of Evidence

In his forty-fourth point of error, Shisinday argues that the trial court should have allowed him to introduce a police offense report explaining the context of his conviction for "aggravated assault on a police officer." What is referred to as Defense Exhibit 13 in the trial record was never offered at trial and was not included in the appellate record for this Court's review. Therefore, nothing is presented for our review.[132]

Shisinday's forty-fourth point of error is overruled. Shisinday complains in his forty-fifth point of error that the trial court would not permit him to introduce various statistical studies regarding the recidivism of capital offenders. The trial judge allowed Shisinday to discuss the results of several other statistical studies. But the judge excluded all of the studies of offenders who were sentenced to death before 1972. Before 1972 an array of offenses were punishable by death, including all murder offenses,[133] kidnapping for extortion,[134] rape,[135] and armed

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[132] *See* TEX. R. APP. P. 33.1(a); *Stewart v. State*, 686 S.W.2d 118, 122 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 866 (1985).

[133] TEX. PEN. CODE art. 1257 (1925) (repealed 1974).

[134] TEX. PEN. CODE art. 1177a (1925) (repealed 1974).

[135] TEX. PEN. CODE art. 1189 (1925) (repealed 1974).

robbery.[136] The trial judge excluded these studies because they were irrelevant and the danger of confusing the issues would outweigh the probative value.

There was no testimony showing that these statistics related to some individual characteristic of Shisinday. General testimony regarding recidivism that is not shown to be relevant to an individual defendant is subject to exclusion.[137] The trial court did not abuse its discretion in not allowing testimony on these statistics. Shisinday's forty-fifth point of error is overruled.

Improper Admission of Evidence

In his forty-first through forty-third points of error, Shisinday argues that the trial court erroneously admitted his prior convictions admitted through Exhibits 120, 103, 105 and 106. He first argues that these judgments did not show that he had counsel or waived a jury trial.[138]

In a collateral attack on the judgment of a prior conviction, the burden is on the attacking party to show that the complete records of the cause were silent as to jury waiver or that the state in which the judgment was instated required jury

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[136] TEX. PEN. CODE art. 1408-(1925) (repealed 1974).

[137] *See Mosley v. State*, 983 S.W.2d 249, 265-66 (Tex. Crim. App. 1998), *cert. denied*, 526 U.S. 1070 (1999).

[138] Citing *Boykin v. Alabama*, 395 U.S. 238 (1969).

waiver to be reflected on the face of the judgment.[139] Shisinday failed to meet this burden. He also failed to show that he was without counsel in the prior proceedings.[140] In fact, all of the exhibits indicate that Shisinday did have counsel.

Shisinday next contends that the trial judge should have excluded the exhibits under Rule of Evidence 403 because their probative value was substantially outweighed by the danger of unfair prejudice. Specifically, Shisinday argues that the offenses had no probative value because they were at least 20 years old and they involved non-violent conduct. But under Rule 403 Shisinday must show that the danger of unfair prejudice outweighs the probative value.[141] "Unfair prejudice" refers to "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[142] Shisinday has not explained how the jury would improperly consider the prior offenses. Although the convictions were at least 20 years old, Shisinday had been in prison for at least 16 of those years. Additionally, the "the law places no

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[139] *See West v. State*, 720 S.W.2d 511, 519 (Tex. Crim. App. 1986) (plurality op.), *cert. denied*, 481 U.S. 1072 (1987).

[140] *See Disheroon v. State*, 687 S.W.2d 332, 334 (1985); *Acosta v. State*, 650 S.W.2d 827, 828 (1985); Maddox v. State, 591 S.W.2d 898, 903 (1979), *cert. denied*, 447 U.S. 909 (1980).

[141] *See Rogers v. State*, 991 S.W.2d 263, 266 (Tex. Crim. App. 1999); *Cohn v. State*, 849 S.W.2d 817, 820 (Tex. Cr. App. 1993).

[142] *Cohn*, 849 S.W.2d at 820 (citing 1 Steven Goode et al, *Texas Practice: Guide to the Texas Rules of Evidence: Civil and Criminal* § 403.2, at 93 (2d ed. 1993)).

remoteness limitations on past convictions offered to show the prior criminal record of an accused."[143] Remoteness limitations apply only to convictions introduced for impeachment purposes.[144] Even though the offenses were non-violent, they were relevant to show Shisinday's past criminal history.[145]

Lastly, Shisinday argues that Exhibit 105 was inadmissible because it contained hearsay. Although he objected on hearsay grounds at trial, Shisinday did not get a ruling from the judge. The judge ruled only on whether this exhibit was excluded under Rule 403. Shisinday has not preserved this point for review.[146] Points of error forty-one through forty-three are overruled.

Prosecutorial Misconduct

In his twenty-fifth point of error, Shisinday contends that the State's improper question of defense witness Dr. Sarmiento violated his Fifth Amendment right to remain silent and Sixth Amendment right to a jury trial. During its punishment-phase case, the defense elicited testimony from Dr. Sarmiento that, just after the offense in 1981, Shisinday had diverted the blame for Harrison's death but that Shisinday had changed

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[143] *Mendoza v. State*, 552 S.W.2d 444, 449 (Tex. Crim. App. 1977).

[144] *Id.*

[145] TEX. CRIM. PROC. CODE art. 37.071 § 2.

[146] *See* TEX. R. APP. P. 33.1(a)(2).

over the years. During the direct examination of Sarmiento the following occurred:

Q: Have you seen any signs of remorse in Mr. Thomas?

A: Yes.

Q: In what way?

A: Well, when I saw him before he said that he was sad that the girl had died but that he didn't really take any real responsibility for that. He blamed Zendal. He blamed the police. He blamed his parents. He blamed society.

And now I think he's really come to realize that he's responsible for his own actions and really to understand why it is wrong to do that . . . . So he understood that that is why it is wrong to do things, to do something like that because of the pain it caused, which is actually a very high level of moral development to understand kind of the principle behind right. and wrong, not just the fact that it is wrong but understand why with respect to how it affects other people and so on.

On cross-examination, the prosecution pursued the following line of questioning:

A: Well, Doctor, on that last point are you saying the defendant has indicated to you

that he's responsible for the death of Miss Harrison and accepts the fact that he's the one that caused her death during the kidnapping?

A. Yes.

Q. Then why would he have plead [*sic*] not guilty?

A. Well–

DEFENSE COUNSEL: Objection, Your Honor. That calls for a comment on the defendant's–

THE COURT: Sustain the objection.

STATE: No, it does not.

DEFENSE COUNSEL: – right to a trial by jury. His Fifth Amendment.

THE COURT: Sustain the objection.

DEFENSE COUNSEL: Ask for a jury instruction.

THE COURT: The jury is to disregard the last question of the Prosecutor.

DEFENSE COUNSEL: Move for a mistrial.

THE COURT: Denied.

PROSECUTOR: Well, under what form did this taking of responsibility take?

Shisinday argues that the question "then why would he have plead [*sic*] not guilty?" violated his right to remain silent. A comment upon a defendant's silence violates the Fifth Amendment of the United States Constitution[147] and Article 38.08. Shisinday also contends that this comment violated his right to a jury trial. A defendant has a Fifth Amendment right to plead not guilty[148] and Sixth Amendment right to a jury determination of guilt.[149]

The State responds by claiming that this question was "invited." Once Shisinday presented psychiatric testimony that he was remorseful and accepted responsibility for his actions, the State argues that the prosecutor was entitled to determine how Shisinday had manifested his willingness to accept responsibility. According to the State, an acceptable way of challenging how Shisinday was accepting and remorseful for his actions was to ask why he plead not guilty.

In *United States v. Robinson*,[150] the Supreme Court discussed the concept of invited error. In that case defense counsel urged several times during closing that the State had not allowed

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[147] *Griffin v. California*, 380 U.S. 609, 615 (1965).

[148] *See Brady v. United States*, 397 U.S. 742, 748 (1970).

[149] *See Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[150] 485 U.S. 25 (1988).

Robinson to explain his side of the story.[151] The State argued that this argument "opened the door" to commenting on Robinson's failure to testify and in rebuttal summation remarked that Robinson "could have taken the stand and explained it. . . ." The Supreme Court held that there was no Fifth Amendment violation of self-incrimination because the comment was a fair response to Robinson's argument. Explaining *Griffin v. California*,[152] the Court said that the Fifth Amendment "prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt."[153] The privilege is violated where a prosecutor on his own asks the jury to draw adverse inferences from a defendant's silence.[154] But when a prosecutor's reference is a fair response to a claim made by the defendant or his counsel, there is no violation.[155] We have also consistently held that the defense can open the door to comments on the failure to testify.[156] But counsel is not permitted to go outside the scope of the invitation.[157]

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[151] *Id.* at 32-33.

[152] 380 U.S. at 614-15.

[153] *Robinson*, 485 U.S. at 32-33; *see also Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976); *Lakeside v. Oregon*, 435 U.S. 333, 338 (1978).

[154] *Robinson*, 485 U.S. at 33.

[155] *Id.*

[156] *See Long v. State*, 823 S.W.2d 259, 269 (Tex. Crim. App. 1992); *Allen v. State*, 693 S.W.2d 380, 385-86 (Tex. Crim. App. 1985); *Nethery v. State*, 692 S.W.2d 686, 703 (Tex. Crim. App. 1985), *cert.*

In this case we find that the prosecutor went outside the invitation. While Shisinday did initially open the door to whether he was remorseful and accepting of his actions, attacking the sincerity of these convictions by asking why he pled not guilty went too far. In *Lopez v. State*,[158] this Court found error was committed when the prosecutor argued the defendants had lied when they entered pleas of not guilty. A defendant has an absolute right to plead not guilty. A plea of not guilty is a denial of every material allegation in the indictment,[159] and upon such a plea, the State bears the burden of proving the defendant's guilt beyond a reasonable doubt.[160] There are no summary determinations of guilt; even in the face of a plea of guilty, the State must still offer evidence of guilt.[161] There are numerous reasons and strategic decisions that go into a defendant's decision to plead not guilty that may have nothing to do with whether the defendant accepted responsibility for his actions. We find that

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denied 474 U.S. 1110 (1986); *Broussard v. State*, 505 S.W.2d 282, 285-86 (Tex. Crim. App. 1974).

[157] *Wilson v. State*, 938 S.W.2d 157, 161 (Tex. Crim. App. 1996); *Johnson v. State*, 611 S.W.2d, 649, 650 (Tex. Crim. App. 1981); *Franks v. State*, 574 S.W.2d 124, 126 (Tex. Crim. App. 1978).

[158] 500 S.W.2d 844, 845 (Tex. Crim. App. 1973).

[159] Art. 27.17.

[160] *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

[161] Art. 1.15.

it was manifestly improper for the prosecutor to ask why Shisinday decided to plead not guilty.

But although the question was improper, we find the court's instruction to disregard cured any error. Any injury from an improper comment is obviated when the court instructs the jury to disregard, unless the remark is so inflammatory that its prejudicial effect cannot reasonably be removed by such an admonishment.[162] As we explained in *Waldo v. State*:

> . . . the . . . presumption that an instruction [to disregard] generally will not cure . . . has been eroded to the point that it applies only to the most blatant examples. Otherwise, the Court has tended to find the instruction to have force . . . . Even where we have found such comment beyond cure, the Court has nevertheless held it can constitute harmless error in context of the particular case.[163]

In *Moore v. State*, the defense had put on a psychologist that testified to responses Moore gave during a psychological test.[164] The prosecutor

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[162] *McKay v. State*, 707 S.W.2d 23, 35 (Tex. Crim. App. 1985); *Logan v. State*, 698 S.W.2d 680, 682 (Tex. Crim. App. 1985).

[163] 746 S.W.2d 750, 753 (Tex. Crim. App. 1988); *see Dinkins v. State*, 894 S.W.2d 330, 356 (Tex. Crim. App. 1995); *Jones v. State*, 693 S.W.2d 406, 408-409 (Tex. Crim. App. 1985).

[164] 999 S.W.2d 385, 405 (Tex. Crim. App. 1999), *cert. denied*, 530 U.S. 1216 (2000).

asked how many of the 175 questions the witness was going to testify to – the prosecutor said that these were answers the defendant have given, "which he can testify to."[165] There was an objection and an instruction to disregard the prosecutor's comment.[166] We held that the comment was not so blatant as to render the instruction to disregard ineffective.[167] In *Hawkins v. State*, the prosecutor made a remark regarding a lack of any showing of remorse by Hawkins during the trial.[168] This Court found that the trial court's instruction to disregard was sufficient to cure any error.[169] We reach the same conclusion in this case. Our examination of the trial record fails to demonstrate that the prosecutor's isolated comment during the punishment phase, which was immediately followed by an admonishment to disregard, was so prejudicial that it could not be cured. The comment did not reveal to the jury any prejudicial information that it was not

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[165] *Id.*

[166] *Id.*

[167] *Id at 406.*

[168] 660 S.W.2d 65, 79 (Tex. Crim. App. 1983).

[169] *Id.*; *see also Dinkins v. State*, 894 S.W.2d 330, 355-56 (Tex. Crim. App. 1995), *cert. denied*, 516 U.S. 832 (1995); *Long v. State*, 823 S.W.2d 259, 269-70 (Tex. Crim. App. 1991), *cert. denied*, 505 U.S. 1224 (1992); *Caldwell v. State*, 818 S.W.2d 790, 799-801(Tex. Crim. App. 1991), *overruled on other grounds, Castillo v. State*, 913 S.W.2d 529 (Tex. Crim. App. 1995); *Bower v. State*, 769 S.W.2d 887, 906 (Tex. Crim. App. 1989), *overruled on other grounds, Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991).

already aware of. Shisinday's twenty-fifth point of error is overruled.

In points of error twenty-seven through twenty-nine, Shisinday argues that the State went beyond the scope of permissible jury argument. During the punishment closing arguments the State argued:

> I submit to you that he and Zendal were in it together. Whatever happened to Sylvia Elaine Harrison in that bedroom, whatever happened to her in that house I submit to you that they were in it together. And I don't have any doubt, I think the evidence is probably pretty clear, that there was some sort of rape involved because if not some sort of rape-
>
> DEFENSE: Objection, Your Honor. Outside the record.
>
> THE COURT: Ladies and gentleman, you will recall the evidence. The lawyers' arguments are not evidence.

To preserve a question for appellate review, the complaining party must obtain an adverse ruling from the trial court.[170] Shisinday did not preserve these points of error for review.[171]

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[170] TEX. R. APP. P. 33.1(a)(2).

[171] *See* discussion *supra* of appellant's twenty-sixth point of error.

Points of error twenty-seven through twenty-nine are overruled.

Charge Error

In his forty-sixth point of error, Shisinday alleges that the court erroneously denied his request for an Article 8.04 instruction concerning intoxication. This complaint was not made to the trial court, therefore this point is waived.[172] A trial court has no duty to *sua sponte* instruct a jury on an unrequested defensive theory.[173] Shisinday's forty-sixth point of error is overruled.

Jury Deliberations

Shisinday contends in his thirty-second point of error that the court coerced the jury into voting for the death penalty by repeatedly instructing it to deliberate despite notes that it could not agree on Special Issue Number Three. A trial court in its discretion may discharge a jury where it has been kept together for such time as to render it altogether improbable that it can agree.[174]

The jury began deliberating at 12:30 p.m. on November 19, 1998. Around 5:45 p.m. the jury sent out a note stating: "[w]e have not

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[172] TEX. R. APP. P. 33.1(a)(1).

[173] *Posey v. State*, 966 S.W.2d 57, 63 (Tex. Crim. App. 1998).

[174] Art. 36.31; *Howard v. State*, 941 S.W.2d 102 (Tex. Crim. App. 1996).

reached a conclusion. We believe it will be some time before we work this out – which we believe we will."

On November 20, 1998 at 10:06 a.m., the jury requested some of Shisinday's psychiatric and school reports. At 11:56 a.m. the jury issued a note indicating that it was unable to agree on Special Issue Number Three and "there seems little hope of any movement on individual juror's positions." At this time, Shisinday moved for a mistrial which was denied. The jury's note did not indicate that it was at an impasse but only that there was "little hope."[175] The night before the jury had indicated that it believed that it could work it out, and that it had just requested more information before sending this note. So, there were significant indications that the jury was still deliberating. The trial court did not abuse its discretion in denying Shisinday's first motion.

Later that day at 3:45 p.m., the jury requested exhibits containing Shisinday's prior conviction judgments. At 4:20 the jury issued a note:

> [w]e the jury remain at the same 9-3 vote. The 3 haven't changed since yesterday, and they insist they will not change. The 9 haven't changed, and they insist they will not change. Continued deliberations are futile.

Following this note, Shisinday's second motion for mistrial was denied. About an hour and a

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[175] *C.f. Howard v. State*, 941 S.W.2d at 122.

half later the jury explained, "[o]f the 3 votes, 1 has repeated that he will not consider any change 'for all of eternity.' The other 2 are holding firm." Shisinday again moved for a mistrial which was denied.

The trial court is not constrained to enter a life sentence after the first sign of juror impasse, but may do so if in its discretion it determines that the jury has been together for such a time as to render it improbable that they can agree.[176] The jury had only been deliberating for a little more than a day, evaluating the testimony of over 35 witnesses and more than 120 exhibits. The trial court did not abuse its discretion in overruling the motion for mistrial.[177]

The next day at 10:04 a.m. the jury showed that it was making progress when it issued the following note:

> [o]ur vote is 10 'no' and 2 'yes.' Of the 'yes' votes, one continues to insist that no argument or discussion will change his position. The 10 'no' votes are firm.

Shisinday again moved for a mistrial. The judge denied the motion and noted that "there had been some change since yesterday evening with respect to the vote in the jury room." In gaining one more "no" vote, the jury did appear to be making

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[176] *Id.* at 121.

[177] *See id.* at 121-22.

deliberative progress.[178] Once again, the trial court was within its discretion in denying Shisinday's motion for mistrial.

The jury continued to deliberate and the following morning it requested five exhibits and testimony regarding where the victim bit Shisinday. At 9:45 a.m. the jury notified the court that it had reached a unanimous verdict.

Considering the length of the trial, number of exhibits, and notes from the jury indicating that they were continuing to deliberate, we hold that the trial court did not abuse its discretion in overruling Shisinday's motions four a mistrial. His thirty-second point of error is overruled.

Post-Trial

Sentencing Statute Unconstitutional

In point forty-seven, Shisinday argues that the prohibition against informing the jury of the consequences of its failure to reach an agreement on the mitigation special issues renders Article 37.0711 unconstitutional. This Court has heard and rejected this argument on numerous occasions.[179] Point of error forty-seven is overruled.

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[178] *See id.* at 122.

[179] *See Raby v. State*, 970 S.W.2d 1, 7 (Tex. Crim. App. 1998), *cert. denied*, 525 U.S. 1003 (1998); *Morris v. State*, 940 S.W.2d 610, 614-15 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1278 (1997); *Rousseau v. State*, 855 S.W.2d 666, 686-87 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 919 (1993); *Draughon v. State*, 831 S.W.2d

Denial of Effective Counsel

In his thirty-fifth point of error, Shisinday contends that articles 1.051 and 26.04, which provide for appointment of counsel to indigent defendants, deprived him of his right to the effective assistance of counsel guaranteed by the Sixth Amendment. Specifically, he contends that the undefined terms "represent" and "assistance" in the statutes somehow denied him the constitutional role of the advocate and assistant. Shisinday has not demonstrated that the Texas courts are applying articles 1.051 and 26.04 in a manner calculated to strip a defendant of his constitutional right to the effective assistance of counsel.

Except in extraordinary cases in which a defendant is completely denied counsel at a critical stage of trial, there is generally no basis for finding a Sixth Amendment violation unless the defendant shows how counsel's specific errors undermined the trial.[180] Shisinday has not alleged that the challenged statutes completely denied him counsel; therefore, he must demonstrate that his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that counsel's deficient performance resulted in a conviction that was unreliable.[181] A general attack

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331, 337 (Tex. Crim. App. 1992), *cert. denied*, 509 U.S. 926 (1993); *Davis v. State*, 782 S.W.2d 211, 221-22 (Tex. Crim. App. 1989), *cert. denied*, 495 U.S. 940 (1990).

[180] *See United States v. Cronic*, 466 U.S. 648, 659 (1984).

[181] *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

on the statutes that merely administrate how and when counsel will be appointed is insufficient to prove that Shisinday was denied his Sixth Amendment right to effective representation. Shisinday's thirty-fifth point of error is overruled.

Cruel and Unusual Punishment

In his forty-ninth point of error, Shisinday contends that his incarceration on death row for eighteen years subjected him to cruel and unusual punishment. We have rejected similar arguments.[182] Shisinday has not alleged that any delays in his case have been due to State tactics designed to prolong his wait and thereby increase his suffering. Any delays have resulted from Shisinday's legitimate entitlement to the benefits of review of his conviction and death sentence and have been necessary to ensure that his conviction and sentence are proper.[183] Shisinday's forty-ninth point of error is overruled.

Excessive Punishment

Shisinday argues in his fifty-first point of error that the Eighth Amendment prohibits imposition of a death sentence because it is disproportionate to the punishment imposed on his accomplice, Zendal Peels. The United States

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[182] *See Janecka v. State*, 937 S.W.2d 456, 476 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 825 (1997); *Bell v. State*, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996), *cert. denied*, 522 U.S. 827 (1997).

[183] *See id.*

Supreme Court has held the Eighth Amendment, applicable to the states through the Fourteenth Amendment, does not require a proportionality review in death penalty cases.[184] We have repeatedly reaffirmed the holding in *Pulley*.[185] Point of error fifty-one is overruled.

Finding no reversible error, we affirm the judgment of the trial court.

DATE DELIVERED: September 12, 2001

DO NOT PUBLISH

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[184] *Pulley v. Harris*, 465 U.S. 37 (1984).

[185] *See Pondexter v. State*, 942 S.W.2d 577 (Tex. Crim. App. 1996); *Morris v. State*, 940 S.W.2d at 615; *Anderson v. State*, 932 S.W.2d 502, 508-509 (Tex. Crim. App. 1996), *cert. denied*, 521 U.S. 1122 (1997); *Hughes v. State*, 897 S.W.2d 285, 294 (Tex. Crim. App. 1994).

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. 73,351

SHOZDIJIJI SHISINDAY (a.k.a. Danny Dean Thomas), Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL
FROM HARRIS COUNTY

WOMACK, J., filed a concurring opinion.

I join the judgment of the Court and its opinion, except as to the following points of error:

If the Court's statement that the appellant's "first death sentence was not carried out so he has not been punished twice for this crime" (*ante* at 8) means that the eighteen years of incarceration was not punishment, I do not agree. I do agree that this retrial does not twice place him in jeopardy.

I do not agree with the Court's statement that the late Mr. Belamy's testimony about the appellant's disoriented demeanor the day after the offense would have been "cumulative or immaterial," *ante* at 11. I do agree that there was no denial of due process.

Along the same lines, I do not agree that Gilliam's testimony about selling the appellant the murder weapon was "cumulative," *ante* at 33. There was other evidence about the gun's being the murder weapon, but none about its being acquired by sale from Gilliam. I do agree that the error was harmless beyond a reasonable doubt.

I am leery of the statement, "Generally, a photograph is admissible if verbal testimony as to matters depicted in the photographs is also admissible," *ante* at 37-38. I agree that there was no error in admitting these photographs.

I have elsewhere published my disagreement with the statement, "A trial court has no duty to *sua sponte* instruct a jury on an unrequested defensive theory," *ante* at 62. *See Posey v. State*, 966 S.W.2d 57, 66 (Tex. Crim. App. 1998) (Womack, J., concurring). Our law expressly provides that "the judge shall deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case,"[186] and that "[w]henever it appears by the record in any criminal action upon appeal that [this or] any requirement . . . has been disregarded, the judgment shall not be reversed . . .

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[186] TEX. CODE CRIM. PROC. art. 36.14.

unless it appears from the record that the defendant has not had a fair and impartial trial."[187] If there was evidence of intoxication that would have warranted the charge, the proper holding would be to affirm the judgment because the omission of the charge did not deny the appellant a fair and impartial trial.

En banc.
Delivered September 12, 2001.
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[187] *Id.*, art. 36.19. *See Almanza v. State*, 686 S.W.2d 157, 172 (Tex. Cr. App. 1985) (such a failure is "[a]n independent basis for reversal [that] arises if the error, even though not timely objected to, is so egregious and creates such harm that it deprives the accused of a 'fair and impartial trial'").

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. 73,351

SHOZDIJIJI SHISINDAY (a.k.a. Danny Dean Thomas), Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL
FROM HARRIS COUNTY

Johnson, J., *filed a dissenting opinion.*

DISSENTING OPINION

Judge Womack has filed a concurring opinion in which he raises some concerns about the language used by the majority opinion in some of the points of error. *Ante*, at ____ (slip op. at 1-2) (Womack, J., concurring). I agree with Judge Womack as to those points of error, but do not join him.

While I agree with the majority that appellant's competence at the time of trial has no bearing on whether he was legally insane at the time

of the offense, I do not agree that appellant's demeanor at trial has no relevance to his presentation of an insanity defense. *See ante*, at ____ (slip op. at 9-10). Juries tend to be skeptical of the defense of insanity. A defendant who is receiving medication appropriate to his condition will appear "normal" to a jury, thus increasing its skepticism. The distinction between "competent to stand trial" and "legally insane at the time of the offense" can easily escape jurors, especially because the definition of "legally insane" is so narrow and very different from what "insane" means to a non-lawyer. In this case, however, appellant was able, as his own reply brief states, to present to the jury "an enormous amount of evidence" concerning his mental illness and its implication as to his sanity at the time of the offense. His forced medication at the first trial did not, therefore, prevent him from adequately presenting his insanity defense at the second trial.

In his twenty-fifth point of error, appellant alleges prosecutorial misconduct because of the prosecutor's question to Dr. Sarmiento about appellant's entry of a plea of not guilty. *Ante*, at – (slip op. at 55). The majority analyzes this point of error as "invited error." *Id.* at ___ (slip op. at 58). I disagree that there was any defense "invitation" to error, and, while the prompt action of the trial court in sustaining appellant's objection and instructing the jury to disregard the question may have tempered the effect of the error, it did not cure the error.

One of the issues before the jury at the punishment hearing in a capital case is whether the defendant is remorseful; lack of remorse is frequently

a prominent topic for discussion by the state in final arguments. *See, e.g., Dewberry v. State*, 4 S.W.3d 735, 743 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1131, 120 S. Ct. 2008, 146 L. Ed. 2d 958 (2000); *Trevino v. State*, 991 S.W.2d 849, 854 (Tex. Crim. App. 1999); *Rachal v. State*, 917 S.W.2d 799, 806 (Tex. Crim. App.), *cert. denied*, 519 U.S. 1043, 117 S. Ct. 614, 136 L. Ed. 2d 539 (1996); *Heiselbetz v. State*, 906 S.W.2d 500, 507-8 (Tex. Crim. App. 1995). Presentation of evidence of remorse by the defendant during the punishment hearing is not an invitation to comment on the defendant's constitutional and statutory right to a trial by jury on a plea of not guilty, regardless of obviousness of guilt. This is especially true in the context of a capital offense. Article 1.14(a) of the Texas Code of Criminal Procedure states that a defendant may waive any right, *except* that "a defendant in a capital felony may waive the right of trial by jury only in the manner permitted by Article 1.13(b) of this code." Article 1.13(b) states: "In a capital felony case in which the attorney representing the State notifies the court and the defendant that it *will not seek the death penalty*, the defendant may waive the right to trial by jury but *only if the attorney representing the State*, in writing and in open court, *consents to the waiver*." (Emphasis added.) By the plain language of the statute, a defendant in a capital case may plead guilty only with consent of the state and, even with the state's consent, only in a case in which the state has chosen not to seek the death penalty. The state is in total control of whether a defendant has even an option to plead guilty. Here, the state sought the death penalty, thereby barring appellant from pleading guilty. For the state to preclude appellant

from pleading guilty and then to imply in front of the jury that appellant could have and should have so plead is egregious prosecutorial misconduct. The error was preserved by a timely objection pursued to an adverse ruling. Because the prosecutor's comments violated appellant's rights under the Fifth and Sixth Amendments to the United States Constitution, the judgment must be reversed unless we determine "beyond a reasonable doubt that the error did not contribute to the . . . punishment." TEX. R. APP. P. 44.2(a). Given this heavy burden, as well as the blatancy of the remark made by the prosecutor,[188] I cannot say beyond a reasonable doubt that the error did not harm appellant.

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[188] As the majority notes, our case law indicates that a court's instruction to disregard such an error is insufficient when the comment is "blatant" or "inflammatory." *Ante*, at ___ (slip op. at 59-60). However, I believe that the majority errs in concluding that the error in the instant case is no more "blatant" than those in *Moore v. State*, 999 S.W.2d 385 (Tex. Crim. App. 1999), *cert denied*, 530 U.S. 1216, 120 S. Ct. 2220, 147 L. Ed. 2d 252 (2000), and *Hawkins v. State*, 660 S.W.2d 65 (Tex. Crim. App. 1983). In *Moore*, a doctor was in the process of testifying as to answers previously given by the defendant in response to questions by the doctor. In attempting to limit this testimony, the prosecutor stated that these were "answers the defendant gave, which the defendant can testify to." we found that the court's instruction to disregard was sufficient to cure the error because the prosecutor's comment "was intended to prevent the witness from serving as a conduit through which appellant could testify without taking the stand" and because the comment was directed to the court, although it was made in front of the jury. *Moore*, 999 S.W.2d at 405-6. In *Hawkins*, we determined that the comments made by the prosecutor "were not such that the jury would naturally and necessarily take them as comments upon appellant's failure to testify at trial." *Hawkins*, 660 S.W.2d at 78-9. In contrast, the comment made in the instant case was directed at the jury, and was so blatant and direct that it could be "naturally and

For the reasons stated here, I would reverse and remand for a new punishment hearing.

Johnson, J.

Date Delivered: September 12, 2001

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necessarily" be taken only as a comment on appellant's right to remain silent and his right to a jury trial. Thus, *Moore* and *Hawkins* do not support the majority's conclusion that the error here was cured by the trial court's instruction to disregard.

Appendix E

Order of Federal District Judge Norman Black Dated July 2, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DANNY DEAN THOMAS, Petitioner, v. GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent.	§ § § § § § § § § § § §	CIVIL ACTION No. H-95-5236

ORDER

This case remains before the Court on Petitioner's *Riggins* claim (Claim Three). He argues that, at the time of his trial, the State forcibly medicated him, against his will, with antipsychotic drugs and that the involuntary medication violated his constitutional rights. The parties agree that (1) Petitioner was involuntarily medicated with antipsychotic medication at trial, (2) that, at the time of Petitioner's trial, the State did not present evidence and the trial court did not make findings that could be said to satisfy the requirements of *Riggins v. Nevada*, 504 U.S. 127 (1992), and (3) the *Riggins* claim is not barred by the retroactivity doctrine enunciated in *Teague v. Lane*, 489 U.S. 288

(1989). The record is void of any attempt to justify the medication and the pleadings replete with affidavits testifying to the adverse effect of the medication on Petitioner's demeanor at trial.

Petitioner argues that when the trial court fails to make the necessary findings, the defendant's conviction must be vacated. The Supreme Court addressed the possibility of making the findings to justify medication post-trial in *Riggins*. The Court stated that "[e]fforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion (to suspend administration of antipsychotic drugs) had been granted would be purely speculative." *Riggins*, 504 U.S. at 137. Furthermore, the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy, and there is no basis for saying that the substantial probability of trial prejudice in his case was justified.

The State argues that this Court may retrospectively make the *Riggins* findings. However, the State has not provided the Court with any cases supporting this course of action, nor is the Court aware of any justification for it.

Ronald Hayes, Petitioner's trial counsel, testified at the state habeas proceeding that he objected to Petitioner's continued medication prior to voir dire. The trial judge overruled the objection and ordered that the medication continue. In her findings of fact and conclusions of law on the state habeas

petition, the trial judge stated that she is not a licensed medical doctor, and could neither order or prescribe medication for the applicant. However, the trial court allegedly ordered that Petitioner's medication be changed or the dosage increased in response to reports that Petitioner had been acting out in jail or had threatened to do so. The medical testimony suggests that Petitioner's prescription could render a person sleepy or sluggish, and trial counsel testified that Petitioner appeared to sleep or feign sleep during trial. The record reflects that the jury was also aware of Petitioner's medication.

The record is void of any findings that support Petitioner's medication under *Riggins*. The Court declines to hold a hearing to determine if the prescription was medically appropriate, and considering less intrusive alternatives, essential for Petitioner's own safety or the safety of others. Testimony on what would or would not have been appropriate 15 years ago at Petitioner's trial would be at best speculative.

The parties submitted a joint motion for reconsideration of Petitioner's claim in light of *Lindh v. Murphy*, 1997 WL 338568 (U.S.) (June 23, 1997). *Lindh* is limited to non-capital habeas applications pending before the AEDPA was signed into law and has no applicability to the present case. The *Riggins* claim is reviewed under the standard laid out in the Court's Order entered May 7, 1997. A final order setting Petitioner's judgment of conviction aside consistent herewithin shall be issued this day.

Signed this 2nd day of July, 1997, at Houston, Texas.

/s/ Norman Black
Norman W. Black
United States District Judge

Appendix F

Order of the Texas Court of Criminal Appeals Dated March 9, 2005

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 15,153-07

EX PARTE DANNY DEAN THOMAS A/K/A SHOZDIJIJI SHISINDAY

HABEAS CORPUS APPLICATION FROM HARRIS COUNTY

Per Curiam.

ORDER

This is an application for a writ of habeas corpus under TEXAS CODE OF CRIMINAL PROCEDURE, Article 11.071.

Applicant was convicted of capital murder in March, 1982. We affirmed the judgment and sentence. *Thomas v. State*, 701 S.W.2d 653 (Tex.Crim.App. 1985). Applicant's original application for writ of habeas corpus was considered by this Court and relief denied on June 7, 1995. Applicant was granted relief in federal court and his conviction was reversed in October, 1997. Applicant was re-tried and convicted on November 22, 1998. We affirmed the judgment and sentence. *Shozdijiji*

Shisinday v. State, No. 73,351 (Tex.Crim. App. April 28, 1999) (not published).

Applicant raises 87 grounds for relief. The record supports the finding of the convicting court that 55 of these claims were raised and rejected on direct appeal. These 55 claims will not be considered. *Ex parte Ramos*, 977 S.W.2d 616, 617 (Tex.Crim.App. 1998).

The judge of the convicting court has entered findings of fact and conclusions of law and she has recommended that relief be denied. This Court has reviewed the record with respect to the allegations made by applicant. We adopt the findings and conclusions of the convicting court. Based upon the convicting court's findings and conclusions and our own review, the relief sought is denied.

IT IS SO ORDERED THIS THE 9TH DAY OF MARCH, 2005.

Do Not Publish

Appendix G

Relevant Constitutional and Statutory Provisions

AMENDMENT V TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

AMENDMENT VI TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT VIII TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

Excessive bail shall not be required, *nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

VERNON'S TEXAS STATUTES AND CODES ANNOTATED CODE OF CRIMINAL PROCEDURE

PART I—CODE OF CRIMINAL PROCEDURE OF 1965

TRIAL AND ITS INCIDENTS

CHAPTER THIRTY-SEVEN—THE VERDICT

Current through End of 2007 Reg. Sess.

Art. 37.0711. Procedure in Capital Case for Offense Committed Before September 1, 1991

Sec. 1. This article applies to the sentencing procedure in a capital case for an offense that is committed before September 1, 1991, whether the sentencing procedure is part of the original trial of the offense, an award of a new trial for both the guilt or innocence stage and the punishment stage of the trial, or an award of a new trial only for the punishment stage of the trial. For the purposes of this section, an offense is committed before September 1, 1991, if every element of the offense occurs before that date.

Sec. 2. If a defendant is found guilty in a case in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment.

Sec. 3. (a)(1) If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to

death or life imprisonment. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of this state. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) Notwithstanding Subdivision (1), evidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct.

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted under Subsection (b) of this section beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue submitted under Subsection (b) of this section "yes" unless it agrees unanimously; and

(2) it may not answer any issue submitted under Subsection (b) of this section "no" unless 10 or more jurors agree.

(e) The court shall instruct the jury that if the jury returns an affirmative finding on each issue submitted under Subsection (b) of this section, it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

(f) The court shall charge the jury that, in answering the issue submitted under Subsection (e) of this section, the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree; and

(3) shall consider mitigating evidence that a juror might regard as reducing the defendant's moral blameworthiness.

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) of this section and a negative finding on the issue submitted under Subsection (e) of this section, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) of this section or an affirmative finding on the issue submitted under Subsection (e) of this section or is unable to answer any issue submitted under Subsection (b) or (e) of this section, the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life.

(h) If a defendant is convicted of an offense under *Section 19.03(a)(7), Penal Code*, the court shall submit the issues under Subsections (b) and (e) of this section only with regard to the conduct of the defendant in murdering the deceased individual first named in the indictment.

(i) The court, the attorney for the state, or the attorney for the defendant may not inform a juror or prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.

(j) The Court of Criminal Appeals shall automatically review a judgment of conviction and sentence of death

not later than the 60th day after the date of certification by the sentencing court of the entire record, unless the Court of Criminal Appeals extends the time for an additional period not to exceed 30 days for good cause shown. Automatic review under this subsection has priority over all other cases before the Court of Criminal Appeals, and the court shall hear automatic reviews under rules adopted by the court for that purpose.

28 U.S.C. 2254 § (D) (2004)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Appendix H

Affidavit of Defense Attorney Charles Rice Young Dated September 28, 1992

No. 346935-A

EX PARTE:	*	IN THE DISTRICT COURT
	*	HARRIS COUNTY, TEXAS
DANNY DEAN THOMAS, a/k/a SHOZDIJIJI	*	180TH JUDICIAL DISTRICT

AFFIDAVIT OF CHARLES RICE YOUNG

THE STATE OF TEXAS	*	
	*	KNOW ALL BY THESE PRESENTS:
COUNTY OF HARRIS	*	

BEFORE ME, the undersigned authority, personally appeared Charles Rice Young, who, being by me duly sworn, deposed as follows:

1. My name is Charles Rice Young and I am an attorney licensed to practice law in the State of Texas. I make this affidavit in response to an order from the 180th District Court of Harris County, Texas, dated July 17, 1992, In the Matter of DANNY DEAN THOMAS, a/k/a SHOZDIJIJI SHISINDAY, No. 346935-A.

2. I, along with Ron N. Hayes, (hereafter "Hayes") represented Danny

Dean Thomas (hereafter "Thomas") at his trial for capital murder, which took place in February and March of 1982.

3. I am aware that Thomas has filed a post-conviction application for writ of habeas corpus and I have reviewed the amended application and the State's answer.

4. I have twice testified in this matter. First, on June 26, 1992, at the hearing on the Thomas' Motion for Recusal, and second, at the hearing on outstanding motions held on August 28, 1992.

5. On both these occasions, I testified concerning the circumstances surrounding the administration of psychotropic medication and the apparent effects of that medication on Thomas prior to trial, during the guilt or innocence part of the trial, and during the punishment stage of the trial. To this affidavit, I incorporate by reference my testimony in those hearings.

6. The July 17th order states that I should prepare an affidavit responding to nine enumerated paragraphs with respect to certain of Thomas' claims. What follows is my effort to respond to the specific dictates of that order.

PREPARATION AND INVESTIGATION FOR TRIAL

7. Hayes and I divided the responsibility for the trial. I undertook the preparation and presentation of the insanity defense and Hayes undertook the responsibility of preparing and presenting the fact defense.

8. In preparing for the insanity defense, among other things, I met with Thomas many times to interview him and discuss his case. I also talked to co-defendant, Zendal Peels, his family, and some of the State's witnesses.

9. Based on my investigation, I recognized that my client was suffering from serious mental illness and I retained an expert psychologist, Dr. Robert Sarmiento, to assist me and to testify at trial. Dr. Sarmiento examined Thomas and verified that he was suffering from serious mental illness and made the DSM III diagnosis of schizophrenia (paranoid) and borderline personality disorder. Sarmiento also believed that these mental illnesses were the cause of insanity which influenced Thomas at the time of the alleged murder. I worked very closely with Dr. Sarmiento so that I could better understand my client, the insanity defense, the testimony of Dr. Sarmiento at trial and the cross-examination of the State's expert witnesses.

10. As part of my preparation, I also obtained and reviewed the voluminous hospital and other medical records relating to Thomas' lengthy admissions to mental hospitals, beginning as a child. The defense introduced these records into evidence to corroborate Dr. Sarmiento's testimony, to impeach the State's experts and to document the seriousness of Thomas' illness.

11. However, State funding for the presentation of expert evidence by the defense on the issue of insanity was limited to $500.00 and this sum of money was utterly inadequate. I paid Dr. Sarmiento some money from the fee I received as court appointed counsel. This sum severely limited the available psychiatric resources for use by the defense.

THE EFFECTS OF MR. THOMAS' FORCED MEDICATION

12. As I testified at the hearings June 26 and August 28, throughout his trial Thomas was medicated with significant dosages of the drugs Dilantin and Prolixin.

13. Prior to Thomas' trial, Judge Lykos and I discussed Thomas' medication and the fact that the medication was heavily

sedating Thomas. The court wanted Thomas on the medication.

14. The medication had

15. a profound effect on Thomas during his trial and did not, in my view, help him understand the trial proceedings. Rather, Thomas was extremely sedated by the medications, which put him in a zombie-like state. As a result of the medication, Thomas slept through much of the trial. At all other times he was in a heavily sedated state.

16. The medications made Thomas appear apathetic and emotionally inert. Thomas rarely discussed his case or the evidence presented by the State with Hayes or myself during the trial. When he was asleep, he didn't discuss it at all.

17. Because of his zombie-like state, counsel for the defense was never sure whether Thomas was participating in the trial or whether he was incapable of assisting in his defense. It was clear that the court wanted to proceed with trial. Although I believe that Thomas was competent, under the law to assist counsel in his defense, I know that he was not alert, attentive or involved in his trial and I doubt that Thomas was capable of being alert, attentive or involved in his trial. However, I thought that Thomas' zombie-

like appearance assisted in the presentation of his insanity defense.

18. The side effects of the medication were apparent throughout the trial. The court did not discontinue the trial, discontinue Thomas on the medication or hold a hearing on his competency. I recall that the court bailiff woke Thomas up one or more times when he was sleeping in front of the jury.

VOLUNTARY INTOXICATION INSTRUCTION

19. I have recently reviewed a transcript of a tape recording provided by the district attorney to counsel for Thomas, which consists of a taped conversation between Thomas and the mother of his co-defendant, Zendal Peels.

20. The conversation is significantly probative of the extent of Thomas' intoxication at the time of the offense and suggests that the intoxication may have been involuntary. Had I known of the existence of the taped, jail conversation, I would have presented the defense of involuntary intoxication and I would have requested a jury instruction on involuntary intoxication. In the absence of this evidence, however, I did not.

ASSISTANCE OF COUNSEL

21. I presented Thomas' defense to the best of my ability. Hayes and I investigated the facts of the case to the extent possible given the limited resources provided by the State. In my judgment, in light of the Thomas confession, I thought that Thomas' strongest defense was the insanity defense which we pursued.

22. We also presented evidence in mitigation of punishment, to the extent possible, without encouraging the jury to find that Thomas was a future danger to society. Of course, because the most persuasive reason to mitigate Thomas' punishment was his history of severe mental illness, out creativity and overall efforts in that regard were chilled.

/s/ Charles Rice Young
Charles Rice Young

SWORN TO AND SUBSCRIBED by me on this the 28 day of September, 1992.

/s/ Susan M. Inferrera
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS

My commission expires: [Notary stamp]

9/14/96

RECEIVED IN POST TRIAL
SYSTEMS-DISTRICT CLERK'S
OFFICE
9-30-92
/s/

Appendix I

Affidavit of Defense Attorney
Ronald N. Hayes
Dated September 28, 1992

No. 346935-A

EX PARTE	IN THE DISTRICT COURT
DANNY DEAN THOMAS, A/K/A SHOZDIJIJI SHISINDAY	HARRIS COUNTY, TEXAS
APPLICANT	180TH JUDICIAL DISTRICT

ATTORNEY'S AFFIDAVIT IN RESPONSE TO POST-CONVICTION WRIT OF HABEAS CORPUS

I am hereby making the following affidavit in response to that oral order of the Court of August 28, 1992, in which I was ordered to respond to the portions of a First Amended Petition for Writ of Habeas Corpus in the above referenced matter, those portions being pages 4 (four) through 15 (fifteen), 23 (twenty-three) through 27 (twenty-seven), 28 (twenty-eight) through 34 (thirty-four), and 96 (ninety-six) through 103 (one hundred three).

RONALD N. HAYES, being sworn, states:

1. I make this affidavit in response to the order of the 180TH District Court of August 28, 1992, in the matter of Ex Parte Danny Dean Thomas, Cause No. 346935-A (the "August 28 Order").

2. In February and March 1982, the attorney Charles Rick Young and I represented Mr. Danny Dean Thomas at his trial for capital murder.

3. I have reviewed the portions of the First Amended Application for Writ of Habeas Corpus that I was ordered to respond to, and including pages 4 through 15, pages 23 through 27, pages 28 through 34, and pages 96 through 103. I have received no other Order other than that oral Order of August 28, 1992, with respect to any affidavit in connection with the matter of Danny Dean Thomas.

4. On two occasions, I have testified in this mater. On June 26, 1992, I testified at the hearing on Mr. Thomas' recusal motion and, I testified again at the hearing on outstanding motions held on August 28, 1992.

5. At these hearings, I testified with respect to the administration of antipsychotic medication to Mr. Thomas during both the guilt-innocence and sentencing phases of his trial for capital murder and concerning the effects of that medication. To the extent that my previous testimony is relevant to the issues noted in the August 28 Order, I respectfully refer the Court to it and incorporate it herein by reference.

6. In accordance with the August 28 Order, the following is my best recollection of my preparation for trial and of the specific matters noted in the August 28 Order.

Pre Trial Preparation and Investigation

7. Rick Young and myself split responsibility for preparing Mr. Thomas' trial and conducting his defense. While Mr. Young investigated and presented Mr. Thomas' insanity defense, I investigated and presented Mr. Thomas' defenses relating to the facts of the crime. However, it was always discussed jointly, the preparation, review, presentation, interviews, and it was a shared effort in both areas.

8. Because Mr. Young and I had decided that Mr. Thomas' best defense was the issue of punishment, and as we did not believe that insanity at the time of the offense could be supported by the evidence, our preparation focused on the factual context of the alleged crime, and on Mr. Thomas' background and an attempt to develop potential mitigating evidence for the trial's penalty phase. I met with Mr. Thomas to discuss his involvement in the alleged crime and his background, as well as the development and strategy for his case. I also interviewed a number of witnesses to gather mitigating evidence to present in the punishment phase of the trial.

9. Because the State allotted Mr. Young and me only a limited amount for investigative assistance, our investigation was significantly limited due to a lack of resources.

10. I understand that the Amended Petition alleges that Mr. Thomas suffered a background characterized by extreme abuse and

neglect. Under the Texas death-penalty statute at the time of Mr. Thomas' trial, a jury's sentencing decision turned on answers to two questions: essentially (1) whether the defendant caused the death of the deceased deliberately and (2) whether there was a likelihood that the defendant would commit future criminal acts of violence. Because the sentencing decision turned on answers to these two questions, our investigation of abuse and neglect in Mr. Thomas' background uncovered information that could help or hurt us. We believed that the presentation of such evidence might serve to encourage a jury to find under the second question that Mr. Thomas presented a future threat of violence. Thus, in light of the harmful potential of such evidence and the limited resources available for the preparation of Mr. Thomas' defense, Mr. Young and I did not think it wise to place a great deal of emphasis on these elements in Mr. Thomas' background.

The Motion to Suppress

11. As part of my and Mr. Young's pre-trial preparation, we moved to suppress Mr. Thomas' confession. I was in charge of preparing and arguing that motion. I primarily argued that the confession should have been suppressed because the State was unable to locate the original copy of the confession. In retrospect, and given the present statute of the law, more emphasis might have been placed on the argument that the confession should have been suppressed because it was involuntary due to Mr. Thomas' psychological condition.

Mr. Thomas' Involuntary Medication

12. As I testified on August 28, before and during Mr. Thomas' trial, Mr. Thomas was medicated with highly potent dosages of psychotropic medications. Prior to voir dire. I objected to the continued medication of Mr. Thomas during his trial. But, the Court overruled the objection and ordered that the medication continue. It was my understanding that the Court ordered Mr. Thomas' continued medication to sedate him because the Court believed that Mr. Thomas might cause a disruption in the courtroom.

13. The medication dramatically affected Mr. Thomas during the trial. Mr. Thomas was extremely sedated by the medications, and he slept through much of the trial. In my twenty-three years as a defense attorney, I have never seen any defendant sleep as much at trial as Mr. Thomas.

14. The medication also altered Mr. Thomas' demeanor. When awake, Mr. Thomas appeared apathetic and disinterested. He slumped on counsels' table, and shuffled in and out of the courtroom. This demeanor may have prejudiced Mr. Thomas' defense by making him appear apathetic and indifferent to the trial. In general, Mr. Thomas did not communicate with Mr. Young and me very much during the course of the trial, and while he slept, of course, he could not communicate at all.

15. When he was sleeping, Mr. Thomas was also obviously unable to follow the progress of the trial and to react to evidence

submitted by the State. I did not object to the continuation of the trial, however, because I thought that the Court already had denied my effort to terminate the medication. I did not believe that the Court was willing to reconsider its decision and felt that repeating the objection would only further annoy the Court, to my client's detriment.

16. Of course, the side effects of the medication were apparent throughout the trial. The only reaction of the Court that I recall, however, was that the Court ordered the bailiff on at least several occasions to awake Mr. Thomas when he was sleeping. The Court did not stop the trial or order that a hearing be held to determine whether Mr. Thomas was competent to stand trial on the medication.

Assistance of Counsel

It is very difficult, at this late stage, to respond to a of the allegations in Petitioner's First Amended Petition for Writ of Habeas Corpus, pages 96 through 103. Not only due to the length of time that has elapsed since the trial, but due to the fact that my file on Mr. Thomas' case has not been located. I can only respond to those portions of those claims to the best of my memory. I will specifically deal with those claims as they begin on page on 97, paragraph 301

(a) The record will speak for itself with respect to the evidence presented in order to attempt to suppress the confession given by Mr. Thomas. I have no specific recollection of any evidence being presented

that would have shown that Mr. Thomas was not mentally competent at the time he made his statement.

(b) Again, I would have no independent recollection of the evidence that was presented that could have enabled a jury to answer special issue No. 1, and would have to defer to the record for such evidence as was presented.

(c) My recollection of the facts of the case would seem to indicate that there was sufficient evidence to tie Mr. Thomas to the crime, and that there was sufficient facts to support the confession that he had given. As to calling Zendal Peels to the stand, it is my recollection that Mr. Peels declined to testify for Mr. Thomas and at his trial, and that charges of Capital Murder were still pending against Mr. Peels at the time of Mr. Thomas' trial.

(d) I have no independent recollection of the evidence of the areas pointed out in the argument on forensic evidence, and would have to defer to the record as to what was or was not presented.

(e) I have no independent recollection of this area, but would again defer to the record as to what evidence was presented.

(f) Again, the record would have to speak for itself as to whether or not it was requested that the defendant's competency be examined during this trial. It was my intention that the record be protected on the objection to him being medicated during his trial, that the record be protected as to his condition and appearance during the trial, and I have

no independent recollection that we requested a competency evaluation of the defendant during the trial.

(g) I have no independent recollection as to the evidence or argument on the intent of Mr. Thomas at the time of the crime, and would have to defer to the record.

(h) It is my recollection that volumes of records were presented with the respect to Mr. Thomas' background of abuse, violence, and neglect as a child, that other evidence was admitted with respect to those areas including his history of drug and alcohol abuse. It is also my recollection that there was evidence of Mr. Thomas' positive aspects presented to the jury, although the record would have to speak for what was presented in that area. Certainly, we were restrained in that area to the extent that we felt that certain aspects of Mr. Thomas' background, if concentrated on too heavily, could cause the jury to be extremely frightened of doing anything other than giving him the death penalty.

(i) Again, the evidence that we presented in the area of the defendant's mental illness, evidence surrounding explanation of the records, would have to be looked to in the record. I have no independent recollection of the extent to which Dr. Sarmiento elaborated on those records in his explanation of his findings.

(j) I have no independent recollection of Mr. Young doing that, but I am sure that if he did,

that it was a trial strategy and would have to be taken in context of everything that he was saying at such time.

(k) It is certainly not true that defense counsel concentrated on an insanity defense. For further elaboration on this point, see my comments under No. 8 above.

(l) I would have to defer to the record with respect to the evidence presented on the issue of a requested charge of intoxication, and as to the evidence presented as to that fact. I have no independent recollection of that area of the case.

(m) To the best of our ability, Mr. Young and I attempted to keep out any inadmissible evidence that the State attempted to introduce.

As to Petitioner's claim of ineffective assistance of counsel on direct appeal, I have the following comments as to those numbered items contained on page 102 of Petitioner's First Amended Petition for Writ of Habeas Corpus:

Item 303. The record would have to speak for itself as to those issues raised on appeal. It was our combined effort to try to raise any issues available to Mr. Thomas that might cause an Appellate Court to reverse his death penalty conviction.

Item 304. Again, the record would have to speak for itself. I have no independent recollection that would indicate that the Court of Criminal

Appeals failed to receive documents which should have been received in connection with such appeal.

Item 305. Such statement is so general, as to not be capable of being responded to. However, the record would speak for itself with respect to those efforts in connection with Mr. Thomas' appeal.

17. I presented Mr. Thomas' defense to the best of my ability. In my judgment, in light of Mr. Thomas' confession, and of the physical evidence supporting the confession, I thought that Mr. Thomas' strongest defense was in the area of punishment, with the hope that a jury would consider the defendant's background in deciding whether to answer the questions to result in the death penalty or not. Moreover, in light of the Texas death-penalty statute then in effect and our limited resources, I believe I investigated and presented mitigating evidence in the punishment phase to the extent possible and beneficial under that statutory scheme.

/s/ Ronald N. Hayes
RONALD N. HAYES

[FILING STAMP]

AFFIDAVIT

STATE OF TEXAS

HARRIS COUNTY

BEFORE ME, the undersigned authority personally appeared RONALD N. HAYES on this 28 day of September, 1992 and who being by me duly sworn did propose and state on her oath the following.

I have read the above foregoing Attorney's Affidavit in Response to Post-Conviction Writ of Habeas Corpus and swear that it is true and correct to the best of my knowledge and ability.

/s/ Ronald N. Hayes

/s/ Judy Schiro
NOTARY PUBLIC in and for the
State of Texas

[Notary Stamp]

[Filing Stamp
of District Court
of Harris County]

Appendix J

Article from Houston Chronicle
Dated March 18, 1982

A Vidor man who spent much of his childhood in mental institutions has been convicted of capital murder here in the kidnapping and slaying of a young secretary.

Danny Dean Thomas, 25, was convicted Wednesday by a jury that rejected his plea of innocent by reason of insanity in the July 18 slaying of Sylvia Elaine Harrison.

In final arguments, prosecutor Gordon Dees said Thomas and codefendant Zendal Peels, 18, who is awaiting trial, abducted the woman and that Thomas shot her in the head because "she was simply a problem that stood in his way."

But court appointed defense attorney Rick Young told the jury that Peels beating of the woman probably set off a psychotic reaction by Thomas.

Thomas who has been under anti-psychotic medication since the crime, sat at the defense table but slept through part of the proceedings Wednesday in the court of State District Judge Patricia Lykos.

The punishment phase of the trial began today. The punishment for capital murder is life in prison or death.

Young and co-counsel Ron Hayes said Thomas was committed for psychiatric treatment in Galveston when he was 9. He was released 1½ years later, but was later committed for a year to the Austin State Hospital, diagnosed as schizophrenic.

A few hours after the slaying, Thomas drove to Galveston's John Sealy Hospital and applied for admission as a mental patient. Police traced him there and elicited a lengthy confession.

Drawing from the confession, Dees, who is being assisted in the trial by prosecutor David Knight, gave this account of the crime:

Thomas and Peels were driving in Thomas' car in north Harris County when they stopped to help Ms. Harrison repair her idled car. They drove her to an auto parts store, helped her install a fan belt, and followed her to her residence, where she was beaten unconscious.

They dragged her into Thomas' car and while driving the vehicle near Greenspoint Mall, Thomas placed a pistol to her head and fired a fatal round. They then attached concrete blocks to her limbs and dumped her body in the San Jacinto River at Interstate 45, where it was found the next day.

The pair then drove to Peels' home, where Thomas told Peels' family there was blood in his car because he had killed a dog. He then left for Galveston. Alerted by the Peels, police traced Thomas to the hospital.

Appendix K

Affidavit of Claudia Riley
Dated September 30, 1992

IN THE 180TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS AND
IN THE CRIMINAL COURT OF APPEALS

EX PARTE	:	CAUSE NO. 346935-A
DANNY DEAN THOMAS, A/K/A SHOZDIJIJI SHISINDAY	:	AFFIDAVIT OF CLAUDIA RILEY

STATE OF DELAWARE)
) ss.:
COUNTY OF NEW CASTLE)

CLAUDIA RILEY, being sworn, states:

1. I testified as a witness at Mr. Thomas's trial for capital murder on March 18, 1982. I knew Mr. Thomas from my work as the Director of the Christian Shelter in Salisbury, Maryland, and was testifying during the penalty phase of Mr. Thomas's trial to provide background regarding his personality and potential for rehabilitation.

2. I was appalled by Mr. Thomas's appearance in court that day. He looked drugged; he was slumped in his chair, with no expression on his face, he almost drooled, and his eyes were glazed.

3. In my work as a social worker, which includes approximately ten years working as a drug and alcohol counselor, I have had extensive experience assessing and working with persons affected by drugs and/or alcohol. I am sure that Mr. Thomas was drugged when I saw him in court on March 18, 1982.

/s/ Claudia Riley

Claudia Riley

Sworn to before me this
30th day of September, 1992.

/s/

Notary Public

Appendix L

Affidavit of Rev. Gloria Ellen Wagner
Dated March 24, 1992

IN THE 180TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS AND
IN THE CRIMINAL COURT OF APPEALS

EX PARTE	:	CAUSE NO. 346935-A
DANNY DEAN THOMAS, A/K/A SHOZDIJIJI SHISINDAY	:	AFFIDAVIT OF REVEREND GLORIA ELLEN WAGNER

STATE OF MARYLAND)
) ss.:
COUNTY OF WICOMICO COUNTY)

REV. GLORIA ELLEN WAGNER, being sworn, states:

1. I testified as a witness at Mr. Thomas' trial for capital murder on March 18, 1982. I had come to know Mr. Thomas through my work at the Christian Shelter in Salisbury, Maryland, and was testifying during the penalty phase of Mr. Thomas' trial to provide background regarding his personality and potential for rehabilitation.

2. When I first saw Mr. Thomas in court the day I testified, I was shocked by his appearance. Mr. Thomas appeared to be highly medicated; he was slumped over, looked like a zombie, and was unable to walk into court by himself. Indeed, I recall that he was only able to walk into

court when two guards or bailiffs assisted him. My first thought upon seeing him in court -- before I had the opportunity to speak with anyone about his appearance -- was "Why do they have him so medicated?".

3. Mr. Thomas remained slumped over the entire time I saw him in the courtroom, and it appeared that he was unable to lift his head so that he could watch or observe the proceedings in the courtroom. He seemed to drop off or sleep for periods of time.

4. This appearance was dramatically different from Mr. Thomas' appearance and demeanor in February 1981 when I had spent time with him at the Christian Shelter. At that time, he was alert and aware of his surroundings, and participated fully in the activities of the shelter.

5. I am a licensed minister in the Church of the Nazarene and I have worked with inmates and prisoners as a chaplain in various institutions for more than 20 years. During that time, I have dealt with many people on medication for various mental illnesses and for other problems. I can say in all honesty, however, that I have never in those 20 years seen a prisoner as severely medicated as Mr. Thomas was during his trial. Other prisoners whom I have observed -- even those who were highly medicated -- have been able to move about on their own or with little assistance, and have been able to lift their heads and observe what is going on around them. As I noted above, Mr. Thomas was able to do neither of these things; he remained slumped down at

the table the entire time I observed him, and was unable to move to his place in the courtroom without the substantial assistance of guards or bailiffs.

/s/ Rev. Gloria Ellen Wagner
Rev. Gloria Ellen Wagner

Sworn to before me this
24th day of September, 1992

/s/
Notary Public
My Commission Expires 3-22-94

Appendix M

Affidavit of Reta Thomas
Dated March 24, 1992

EX PARTE	:	CAUSE NO. 346935-A
DANNY DEAN THOMAS, A/K/A SHOZDIJIJI SHISINDAY	:	IN THE 180TH DISTRICT COURT HARRIS COUNTY, TEXAS

AFFIDAVIT OF RETA THOMAS

STATE OF TEXAS)
: ss.:
COUNTY OF ORANGE)

RETA THOMAS, being sworn, states:

1. Danny Dean Thomas is my son. I was present during his entire trial in February and March of 1982 for capital murder, and I testified as a witness during the penalty phase of that trial. For the remainder of the trial, I was seated outside the courtroom, where I had the opportunity to observe my son as he was moved to and from the courtroom at the start and end of each court session.

2. It was obvious from my son's appearance as I observed him each day that he was being heavily medicated. He looked dramatically different from the young man I knew as my son; rather than the alert, alive person I knew him to be, I saw a young man who looked like he was in a stupor,

with his head hung down. He looked as if he was half asleep.

3. Danny continued to appear this way throughout the trial, as I observed him entering and leaving the courtroom. He also appeared to be in the same, highly medicated condition when I testified during the penalty phase of the trial on March 18, 1982.

4. Before the trial, when I visited Danny in the Harris County Jail, I was present when a jail official brought pills for Danny to take. I heard the official tell Danny that if he didn't take the pills, he would be forcibly injected, because he had to take the medication.

5. My son told me, during a later visit, that when the officials learned that he wasn't taking the pills, they began forcibly injecting medication into him. He said that these officials would hold him down so that the medication could be injected. He said that he couldn't stop the officials from sticking the needle into him.

6. My son also described the effect this medication had on him. He told me that the medication made him feel like he wanted to sleep all the time. He also appeared to me to obviously be on some kind of medication, since his eyes were dilated, and he had difficulty speaking; he spoke as if he were thick-tongued.

7. I was also present with my son when he sought psychiatric care following the crime and when he was arrested while seeking that care.

8. Danny contacted me at about 11:00 p.m. on the day after the crime by calling me on the telephone. When he called, he sounded very weird, as if he were spaced out.

9. I went to meet him and he seemed very spaced out and weird. I could not smell any alcohol on his breath, but knew that he was acting bizarre. He also looked strange; his pupils were dilated and were very tiny.

10. My husband and I stayed with Danny that night, and while we tried to get him to eat food, he was unable to either eat or sleep. The next morning at around 6:00 a.m., we went to the hospital emergency room at John Sealy Hospital and I told the people there that my son needed to see a psychiatrist. We waited for a long time, and at my prestence eventually Danny did see a doctor. After he saw the doctor, we returned to the waiting room, and sometime later, two guards came and arrested my son. This arrest occurred sometime early the next morning, around 1:00 a.m., after we had spent the entire day and night at the hospital. During this entire time at the hospital, Danny was not able to eat food, or sleep. One time, he did lie down for 20 or 30 minutes and while I thought he was sleeping, his body would jerk or jump and he would get up and sit upright and then go back to a fetal position.

11. During this entire time at the hospital, his strange behavior and mood also continued. He had sort of an off-in-space look, which was very different from his normal demeanor. Another strange thing about the way he was acting was the fact that despite his being a heavy smoker, he did not smoke during the entire time I was with him from the initial phone call to his arrest.

12. The guards who arrested Danny at the hospital also asked me where Danny's car was. I took them to his car, and over my objections, they unlocked the car. One officer reached under the driver's seat and appeared to pull out a gun. This astonished me, because the day before, the car had been full of Danny's clothes and personal effects, and my husband and I had taken those things out of the car. We went through the car thoroughly, and I know that the gun the guard appeared to pull out was not in the car at that time.

13. I also had a conversation with Martha Peels during the trial that I wanted to tell the Court about. Martha Peels is the mother of Zendal Peels, the man who, with my son, was accused of murdering Sylvia Harrison.

During the trial, Ms. Peels told me that the District Attorney had made a "plea bargaining" with Zendal.

/s/ Reta Thomas

_____

_____

_____

Reta Thomas

Sworn to before me this
24 day of September, 1992. [NOTARY SEAL]

/s/ Robert A. D'Armond
Notary Public

Appendix N

Gilliam Testimony

Trial Vol. 18, pgs. 98-102

(WHEREUPON, the document marked, offered and received into evidence as State's Exhibit No. 67, containing the sworn testimony of ERNEST K. GILLIAM, was read to the jury as follows, Questions read by Ms. Waters and Answers read by Mr. McClellan:)

"Q. Could you state your name?

"A. Ernest K. Gilliam.

"Q. How old are you, sir?

"A. 60.

"Q. Sir, where do you live?

"A. 4916 Anchor.

"Q. How long have you lived in Houston?

"A. 27 years.

"Q. And what do you do for a living?

"A. Service station work.

"Q. Sir, let me direct your attention back to last summer, back in the summer of 1981, and ask you if back at that time you knew a man named Danny Dean Thomas?

"A. Yes, sir.

"Q. How did you know Mr. Thomas?

"A. Well, through my wife. She used to babysit when he was a kid.

"Q. All right. And when is -- and is that the way you came to know him?

"A. Yes.

"Q. Now, do you see him in the courtroom today?

"A. Yes, sir.

"Q. Would you please point him out, sir?

"A. Right over there, that green suit.

"Q. And I ask if you last year -- last summer you owned a pistol at that time?

"A. Yes, sir.

"Q. What kind of pistol did you own?

"A. .25 automatic.

"Q. And how long had you had that pistol?

"A. About three years.

"Q. Mr. Gilliam, let me ask you to look at State's Exhibit No. 10 and I ask you, sir, if you recognize that item?"

MS. WATERS: For the record, Your Honor, there is a notation on State's Exhibit No. 10 from the previous proceeding that it was still at that time, State's Exhibit No. 10, dated March 3rd, 1982.

THE COURT: So ordered.

"A. Yes, sir.

"Q. What is that?

"A. .25 automatic pistol.

"Q. Where have you seen this pistol before?

"A. I had it and I showed it to Danny Thomas.

"Q. How long have you had this pistol, State's Exhibit No. 10, before you sold it to Danny Dean Thomas?

"A. Approximately three years.

"Q. Do you remember about what time it was last year you sold it to Danny?

"A. I believe it was in July, sir.

"Q. How did you happen to sell him that pistol in July?

"A. Well, he was staying there at the house with us and he saw it and he wanted to buy it. I sold it to him.

"Q. Did he tell you why he wanted to buy it at that time?

"A. No, sir.

"Q. Were you showing it to him on some day or how did he come to see it?

"A. Well, I carry it to the station when I close it up and I laid it on the table and he saw it.

"Q. How much did you sell that gun for?

"A. $50.

"Q. And was that the last time you saw Danny?

"A. Yes, sir.

"Q. How long did he stay with you?

"A. A little over three weeks.

"Q. Anybody else with him staying with you at that time?

"A. His wife.

"Q. And who was his wife?

I can't -- Phoebe I think was her name.

"Q. After you sold him that pistol how long after that did he move out from where you-all were staying?

"A. About two or three days.

"Q. Is that the last time you saw him?

"A. Yes, sir."

THE PROSECUTOR: "Pass the witness, Your Honor."

MS. WATERS: Questions by Mr. Hayes.

"Cross-examination.

"Q. Mr. Gilliam, was there one clip or two clips of that gun when you sold it to the defendant?

"A. Pardon.

"Q. Was there one clip or two clips?

"A. One.

THE DEFENSE ATTORNEY: "That's all the questions I have, Your Honor."

THE PROSECUTOR: "I have no further questions, Your Honor."

THE DEFENSE ATTORNEY: "Pass the witness."

MS. WATERS: Your Honor, at this time, the State would call Bill Olive; but, my understanding is it was going to be a lunch break.

THE COURT: Would you-all come up for just a second, please.

(WHEREUPON, there was a discussion held at sidebar, outside the hearing of the court reporter.)

THE COURT: Ladies and gentlemen, I am going to go ahead and call a lunch recess at this point. Please do not discuss the case when you are on the break. Please feel free to talk about anything else other than the case.

Would you retire to the jury room, please.

(Lunch recess.)

THE COURT: Would you be seated, please.

Good afternoon.

Miss Waters, call your next, please.

MS. WATERS: At this time the State calls William Olive.

THE BAILIFF: He needs to be sworn.

(Witness sworn.)

Appendix O

Objection to Introduction of Gilliam Testimony

Trial Vol. 18, pgs. 91-102

THE COURT: Thank you, Major. You are excused.

Would you call your next witness, please.

MR. McCLELLAN: At this time, Your Honor, the State was going to offer into evidence a transcript from a previous proceeding, would offer into evidence a portion of Volume 26 marked as State's Exhibit No. 67 and tender to Defense Counsel for his examination.

MR. CORNELIUS: We will have a lengthy objection to that.

THE COURT: Ladies and gentlemen, let me ask you to retire to the jury room for just a moment, please while we discuss a legal matter.

(WHEREUPON, the following proceedings were had outside the presence and hearing of the jury:)

MR. CORNELIUS: We are proceeding outside the presence of the jury. It's been proffered that the testimony of Ernest Gilliam will be read to the jury by the District Attorney's Office.

My understanding is the witness is deceased. He testified at the previous trial for which that conviction was reversed, as the Court knows and it is established in this record.

We would object to the testimony being read for several reasons: First reason is this entire case was reversed on the Sixth Amendment issue based on the Riggins case concerning the defendant's lack of ability to cross-examine, effectively participate in the cross-examination and the confrontation of the witnesses in the case because he was drugged or on drugs during the time of his trial.

We think that the State's attempt now to introduce before the jury selected portions of that prior testimony for which the entire case was reversed because the defendant wasn't able to properly cross-examine the witnesses or participate in their cross-examination or confront the witnesses, would constitute error in this case and would be, in our estimation, reversible error. That's Objection No. 1.

Objection No. 2 is because of the fact that the defendant wasn't able to participate in the proper confrontation and cross-examination of this witness at his first trial certain things were not developed.

I expect the evidence would show, if the testimony was allowed to be read, that this person sold a .25 caliber pistol to the defendant. I expect -- this is my speculation now, but for purposes of making my record now I expect that that is the reason the State is offering it, to put what the State, their theory is, the murder weapon in the hands of the defendant.

However, because the defendant wasn't allowed to properly cross-examine the witness at his trial because of being on drugs and now the witness is

deceased we are not able to cross-examine the witnesses and develop the things that we need to develop if he were alive to show the true facts and circumstances concerning the purchase of this pistol and who the pistol was actually purchased for and the reason why the pistol was purchased. We can't do that because the witness is unavailable.

For these reasons we object to the reading of the testimony of Ernest Gilliam in the record.

One second.

(WHEREUPON, there was a conference between the Defense Attorneys outside the hearing of the court reporter.)

MR. CORNELIUS: Also because of the change in the law concerning Special Issue No. 3, this witness would have been a mitigating witness for the Defense, would be today if he were alive; but, because of the fact that couldn't be developed at the other trial we further object to the witness's testimony being read.

And further call the Court's attention that we filed a specific motion to dismiss this case, for this reason among others, that because we are denied the right to use this witness in the defense and feel like the Defense is not getting due process because it can't today, 17 years after the alleged commission of this offense, properly defend himself by calling this specific witness and others.

For all those reasons we would object to the State reading this to the jury.

THE COURT: Are you going to say something or just standing up?

MR. McCLELLAN: No.

THE COURT: Okay.

MR. McCLELLAN: The portion of the rules of evidence I think relating to this, what the Court is looking for, is 801(b) or something.

MS. WATERS: 804 (a) (b) (1) .

MR. McCLELLAN: 804 (a) (b) (1) .

THE COURT: Give me a minute.

Can I see it? Is that it?

MR. McCLELLAN: I am just showing the volume that it came out of.

THE COURT: Okay.

MR: McCLELLAN: And we have the death certificate.

All in one we have deleted references to "jury" and "trial." In one place back there in the certification by the court reporter says from the trial. So, we will delete that before it is given to the jury.

MR. CORNELIUS: Are you letting it in?

THE COURT: What?

MR. McCLELLAN: I am assuming.

MR. CORNELIUS: She hadn't ruled yet.

THE COURT: Do you have any other objections you want to make?

MR. McCLELLAN: Your Honor, as to State's Exhibit No. 67, we have made certain deletions in reference to places where it says "ladies and gentlemen of the jury" or references to "trial" or things of that nature.

I assume that the Defense does not object to our deleting those from State's Exhibit 67.

MR. CORNELIUS: We object to any reading, doesn't matter what's deleted or not deleted. We object to any reading of the deceased witness's testimony.

THE COURT: Okay. I understand, but not withstanding your previous objection, do you want it in or out?

MR. CORNELIUS: I am sorry. I don't mean to be difficult, but I am not going to go on the record saying anything that indicates in any way that we agree to anything of this being read.

MR. McCLELLAN: Guess under the doctrine of optional completeness he would be able to put that back in if he wanted to.

THE COURT: Okay. That's assuming that the proper predicate is laid, I will overrule your objection.

MS. WATERS: We have a death certificate.

THE COURT: It has not been offered yet.

MS. WATERS: We will be glad to offer State's Exhibit No. 68, which is a death certificate of Ernest Gilliam.

THE COURT: Do you have an objection to that?

No?

State's Exhibit No. 68, do that in front of the jury or not.

(Brief recess.)

(WHEREUPON, the following proceedings were had within the presence and hearing of the jury:)

THE COURT: Be seated, please.

Mr. McClellan.

MR. McCLELLAN: At this time, Your Honor, the State would offer into evidence State's Exhibit No. 67, which is the transcript of testimony of an Ernest Gilliam at a previous proceeding in 1982. The case of the State of Texas vs. Danny Dean Thomas,

Cause No. 346,935. Tender that to Defense Counsel for his examination.

MR. CORNELIUS: We just offer the same objections we offered outside the presence of the jury.

THE COURT: Yes, sir. So noted.

MR. McCLELLAN: The State would also offer into evidence, Your Honor, State's Exhibit No. 68, which is a certificate of death for Ernest Gilliam.

MR. CORNELIUS: No objection to that.

THE COURT: State's Exhibit No. 68 will be admitted.

MR. McCLELLAN: And his testimony, Your Honor, I would ask that Miss Waters read the questions and I will respond by the answers.

THE COURT: Okay.

MR. McCLELLAN: Be on the stand or just stand here.

THE COURT: If you can talk loud enough.

MR. McCLELLAN: I can talk loud enough.

THE COURT: I think you can.

MS. WATERS: May I proceed?

THE COURT: Please.

Appendix P

Relevant Juror Notes During Deliberations

Clerk's Record, pgs. 433-35

Your honor:

We are unable to agree on Special issue #3. There seems little hope of any movement on individual juror's positions.

We ask your guidance.

John Campbell

Filed Nov. 20, 1998, 11:56 am

* * *

Ladies & Gentlemen:

Please continue your deliberations.

[Judge] DM Strickland

* * *

Your Honor:

We the Jury remain at the same 9-3 vote. The 3 haven't changed since yesterday, and they insist they will not change. The 9 haven't changed, and they insist they will not change.

Continued deliberations are futile.

Respectfully,

John Campbell

Filed Nov. 20, 1998, 4:20 PM

* * *

Ladies & Gentlemen:

You are to continue deliberating.

[Judge] DM Strickland

* * *

Your Honor:

We have 9 votes "no" and 3 votes "yes." Of the 3 votes, 1 has repeated that he will not consider any change "for all of eternity." The other 2 are holding firm.

Of the 9 "no" votes, all are firm.

Respectfully,

John S. Campbell

Filed Nov. 20, 1998, 5:50 p.m.

* * *

Your Honor:

Our vote is 10 "no" and 2 "yes." Of the "yes" votes, one continues to insist that no argument or discussion will change his position. The 10 "no" votes are firm.

Respectfully,

John S. Campbell

Filed Nov. 21, 1998, 10:04 a.m.

Appendix Q

Motions for Mistrial during Jury Deliberations

Trial Vol. 26, pgs. 3-8

(WHEREUPON, the jury was retired to continue their deliberations.)

(WHEREUPON, the following proceedings were had outside the presence and hearing of the jury:)

THE COURT: I have received a note stamped 11:56 a.m. this morning indicating the jury is unable to agree on Special Issue No. 3. It is now 2:56 according to my watch. The jury has been, since the note was sent out, been to lunch and been on at least one break.

MR. CORNELIUS: And you are proposing to do what?

THE COURT: I was going to send them a note, "Please continue your deliberations."

MR. CORNELIUS: For the record, we object to that and move for a mistrial. I think that any further deliberations will be unconscionable since the jury sent out a note saying after conscientious deliberation they can't resolve Issue No. 3. So, we move for a mistrial.

THE COURT: That is denied.

(Brief recess.)

4:25 p.m.

THE COURT: Make your motion. Go ahead and make a motion.

MR. CORNELIUS: We are on the record now?

THE COURT: Sure.

MR. CORNELIUS: And the note has been marked and filed?

THE COURT: Yes, sir.

MR. CORNELIUS: Can I read it into the record?

THE COURT: Sure.

MR. CORNELIUS: We have just received a note or actually I don't know, came in at 4:20 and it is now 4:30. "We the jury, remain at the same 9/3 vote. The three haven't changed since yesterday and they insist they will not change. The nine haven't changed and they insist the will not change. Continued deliberations are futile."

Based upon this note, Your Honor, we would moye for a mistrial in the case.

THE COURT: I will deny your motion at this time.

For the record I will note that the jury sent out a note yesterday at the end of the day 5:45 and said they could resolve. We believe it will be more time before we work this out which we believe

we will, which was the note yesterday afternoon. So, I will deny your motion at this point.

MS. WATERS: Are you going to write "continue deliberating"?

MR. CORNELIUS: Just for the record, we object to the Court's instruction to the jury which was: You are to continue deliberating.

THE COURT: Okay.

(Brief recess.)

* * *

5:05 p.m.

MR. CORNELIUS: Go on the record. I would like the record to reflect that it's 5:00 o'clock on Friday afternoon. The jury went out yesterday on punishment about 12:30. They still don't have a verdict. The last note which was received at 4:20 indicated that they had been deadlocked nine to three since yesterday afternoon. Didn't say what time yesterday afternoon just said yesterday afternoon. It said that three people that were on the three people's side were not going to change and nine people on the nine people's side were not going to change. They have been deadlocked that way for 24 hours, give or take a few minutes depending on what time yesterday they arrived at that position. It could have been longer than 24 hours.

Irrespective of how long they have deliberated they have been deadlocked for over 24 hours and we feel that any further deliberations

would violate their consciences and would violate the defendant's Sixth and Eighth Amendment rights and Fourteenth Amendment right to due process.

So, we again move for a mistrial.

THE COURT: It is denied.

MR. CORNELIUS: We request a jury instruction which I filed with the clerk which is to the effect that the jury be instructed if you are going to allow them to keep deliberating, which I am sure you are since you just overruled my motion for mistrial, that they be instructed if they can't arrive at a unanimous verdict on the special issues concerning favoring death or a 10-person agreement on special issues favoring life that a mistrial must be declared and that the defendant would not be discharged, that the defendant would receive an automatic life sentence.

Further to instruct them that they are not to do violence to their own consciences.

And we would request that instruction be given at this time, Your Honor.

THE COURT: Okay.

MS. WATERS: I would object to that instruction being given pursuant to Art. 37.071., Sec. 2. I believe it is improper for the jury to be told the result of their hanging.

THE COURT: Deny your requested instruction.

MR. CORNELIUS: Okay. Thank you.

(Brief recess.)

5:50 p.m.

MR. CORNELIUS: It is now 10 minutes to 6:00 on a Friday night, November the 20th, by the clock on the courthouse wall, 10 minutes to 6:00. The jury sent out another note which informs the Court that they are still hopelessly deadlocked, that three of the jurors are voting "yes" on the third issue -- I presume that's what they mean -- and nine are voting no.

The note further says that one of the jurors has made the statement he will hold out for all of eternity and the other two are holding firm.

We would again move for a mistrial for the other reasons stated earlier and add that at this point surely any change in any of the juror's position either for the Defense or against the Defense would violate their consciences and we move for a mistrial.

THE COURT: I will deny your motion.

6:00 p.m.

(WHEREUPON, the proceedings were recessed until the 21st day of November, 1998.)

* * *

Trial Vol. 27, pgs. 3-5

(WHEREUPON, the jury was retired to continue their deliberations.)

(WHEREUPON, the following proceedings were had outside the presence an hearing to the jury:)

MR. CORNELIUS: May I proceed?

THE COURT: Please, sir.

MR. CORNELIUS: Let the record reflect that it is about 10:18 on November the 21st. The jury is still deliberating. We received a note – I have been told that we have received the note and the note says the jury is now ten to two, ten votes for no and two votes for yes. We understand that to mean that would be ten votes for death and two votes for life which is the way we have interpreted it.

We move for a mistrial again as we did yesterday on numerous occasions because we feel that any further deliberations on the part of the jury would violate their consciences and not be productive and violate the defendant's Sixth and Eighth Amendment rights and Fourteenth right as well.

The note further said that the two that were holding out were standing firm and the notes have indicated yesterday that at least one of the ones that are holding out said he would hold out until eternity. And making such a strong statement as that any change, if he were make a change at any time, would obviously violate his conscience and violate the defendant's rights.

We move for a mistrial.

THE COURT: It is denied.

* * *

5:55 p.m.

MR. WENTZ: Your Honor, at this time it is Saturday, the 21st, which is five minutes to 6:00 and the Defense at this time would respectfully move for a mistrial. Deliberations have effectively been going on for two and a half days and further deliberations would be unduly coercive of this particular jury.

The jury has sent out notes indicating their position. The last note came out, if I am not mistaken, earlier today. When they have sent out notes they have essentially gone unanswered and I think that the jury does not know essentially where it is and is without direction conceivably at this time. And being without direction their deliberations take on a further coercive nature and we would move for a mistrial at this time.

It is our belief that the jury has been deliberating for approximately 17 hours roughly at this time.

THE COURT: Okay. I will deny your motion and the record should reflect that the last note I received from the jury was this morning at 10:00 o'clock and indicated that there had been some change since yesterday evening with respect to the vote in the jury room.

Deny your motion.

MR. WENTZ: And we would at this time again request that the charge provisionally requested be submitted to the jury and we believe that making this request at this time after this lengthy amount of deliberations would be an appropriate action at this time.

THE COURT: Okay. I will deny your request.

MR. WENTZ: Thank you very much.

(WHEREUPON, the proceedings were recessed until the 22nd day of November, 1998.

* * *

Trial Vol. 28, pgs. 3-5

(WHEREUPON, the jury was retired to continue their deliberations.)

(WHEREUPON, the following proceedings were had outside the presence and hearing to the jury:)

THE COURT: Go ahead.

MR. WENTZ: Your honor, comes now the Defense earlier this morning I made a motion for a mistrial to the Court which is included in the Court's record on a handwritten piece of paper. It is now Sunday, the 22nd, it is approximately 10:07. There has been an indication from the jury that they do have a verdict.

We would move for a mistrial prior to the entry of this verdict for the reason that the jury deliberations that have caused this verdict to come in have been lengthy and coercive upon the individual members of this jury. Jury members were told that they would not have to work on weekends or generally were spoken to in that proposition during voir dire and during their individual voir dire.

We are now at least halfway through a weekend and we would move that the verdict reached at this point would be coercive and contrary to the general instruction that may have been given to the jurors during their voir dire and would lead them to feel more compelled to render a verdict at this time than any other time.

THE COURT: I will deny your motion.

Appendix R

List of Cases Raising Issue in Question No. 2

Cases Before the United States Court of Appeals for the Fifth Circuit

1. *Jackson* v. *Dretke*, 181 Fed. Appx. 400, 2006 WL 1308063 (5th Cir. Tex. 2006)
2. *Alexander* v. *Johnson*, 211 F.3d 895 (5th Cir. 2000)

Cases Before the Texas Court of Criminal Appeals

1. *Masterson* v. *State*, 155 S.W.3d 167 (Tex. Crim. App. 2005)
2. *Resendiz* v. *State*, 112 S.W.3d 541 (Tex. Crim. App. 2003)

Cases Before the Federal District Courts in Texas

1. *Moore* v. *Quarterman*, 526 F. Supp. 2d 654 (W.D. Tex. 2007)
2. *Hudson* v. *Quarterman*, 2007 U.S. Dist. LEXIS 69693 (N.D. Tex. Sept. 20, 2007)
3. *Johnson* v. *Quarterman*, 2007 U.S. Dist. LEXIS 69353 (N.D. Tex. Sept. 18, 2007)
4. *Blanton* v. *Quarterman*, 489 F. Supp. 2d 621 (W.D. Tex. 2007)
5. *Haynes* v. *Quarterman*, 2007 U.S. Dist. LEXIS 5320 (S.D. Tex. Jan. 25, 2007)
6. *Scheanette* v. *Dretke*, 2006 U.S. Dist. LEXIS 21200 (N.D. Tex. Apr. 10, 2006)

7. *Martinez* v. *Dretke*, 426 F. Supp. 2d 403 (W.D. Tex. Mar. 29, 2006)

8. *Turner* v. *Dretke*, 2006 U.S. Dist. LEXIS 11310 (N.D. Tex. Mar. 20, 2006)

9. *Roach* v. *Dretke*, 2005 U.S. Dist. LEXIS 19697 (N.D. Tex. Sep. 9, 2005)

10. *Kimmel* v. *Dretke*, 2005 U.S. Dist. LEXIS 16920 (W.D. Tex. Aug. 16, 2005)

11. *Prieto* v. *Dretke*, 386 F. Supp. 2d 767 (W.D. Tex. 2005)

12. *Martinez* v. *Dretke*, 2005 U.S. Dist. LEXIS 11089 (N.D. Tex. June 8, 2005)

13. *Cannady* v. *Dretke*, 2005 U.S. Dist. LEXIS 42482 (S.D. Tex. Apr. 29, 2005)

14. *Amador* v. *Dretke*, 2005 U.S. Dist. LEXIS 6072 (W.D. Tex. Apr. 11, 2005)

15. *Brown* v. *Dretke*, 2004 U.S. Dist. LEXIS 24634 (W.D. Tex. Dec. 3, 2004)

16. *Hinojosa* v. *Dretke*, 2004 U.S. Dist. LEXIS 22032 (W.D. Tex. Sept. 30, 2004)

17. *Brooks* v. *Dretke*, 2004 U.S. Dist. LEXIS 30467 (W.D. Tex. June 2, 2004)

18. *Bagwell* v. *Cockrell*, 2003 U.S. Dist. LEXIS 16107 (W.D. Tex. Aug. 14, 2003)

19. *Flores* v. *Cockrell*, 2003 U.S. Dist. LEXIS 6674 (W.D. Tex. Mar. 31, 2003)

20. *McWilliams* v. *Cockrell*, 2002 U.S. Dist. LEXIS 22645 (S.D. Tex. Dec. 31, 2002)

21. *Kunkle* v. *Cockrell*, 2002 U.S. Dist. LEXIS 26951 (S.D. Tex. Sept 2, 2002)

22. *Hopkins* v. *Cockrell*, 2001 U.S. Dist. LEXIS 14871 (N.D. Tex. Aug. 9, 2001)

Appendix S

Punishment Phase
Jury Charge, 1998 Trial

CAUSE No. 346935

THE STATE OF TEXAS	§	IN THE 180TH DISTRICT COURT
vs.	§	OF HARRIS COUNTY, TEXAS
SHOZDIJIJI SHISINDAY	§	NOVEMBER TERM, A. D., 1998
AKA DANNY DEAN THOMAS		

Members of the Jury:

By your verdict returned in this case you have found the defendant, Shozdijiji Shisinday also known as Danny Dean Thomas, guilty of the offense of capital murder, which was alleged to have been committed on or about the 18th day of July, 1981, in Harris County, Texas. In order for the Court to assess the proper punishment, it is necessary now for you to determine, from all the evidence in the case, the answers to certain questions, called "Special Issues," in this charge. The Court instructs you in answering these "Special Issues" as follows:

The mandatory punishment for the offense of capital murder of which you have found the defendant guilty is death or confinement in the Texas Department of Criminal Justice, Institutional Division, for life.

In determining your answers to the questions, or special issues, submitted to you, you shall consider all the evidence submitted to you in this whole trial, which includes that phase of the trial where you were called upon to determine the guilt or innocence of the defendant, and this punishment phase of the trial where you are now called upon to determine the answers to Special Issues submitted to you by the Court. However, in this punishment phase of the trial you should not consider the instructions given you in the first phase of the trial that relate to the law of parties and the responsibility of parties for the acts of others in the commission of offenses. You shall consider only the conduct and state of mind of this defendant in determining what your answers to the Special Issues shall be.

You shall consider all evidence submitted to you during the whole trial as to the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

You are instructed that when you deliberate on the questions posed in the special issues, you are to consider all relevant mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the State or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character, background, or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there is a mitigating circumstance or circumstances in this case, you must

decide how much weight it/they deserve, if any, and thereafter, give effect and consideration to it/them in assessing the defendant's personal culpability at the time you answer the special issue.

The State must provide Special Issue No. 1 submitted to you beyond a reasonable doubt, and you shall return a Special Verdict of "YES" or "NO" on Special Issue No. 1.

In deliberating on Special Issue No. 1 you shall consider all the evidence admitted at the guilt or innocence stage and the punishment stage of trial, including evidence of the defendant's background, character, or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

You may not answer Special Issue No. 1 "YES" unless you agree unanimously.

You may not answer Special Issue No. 1 "NO" unless ten (10) or more jurors agree.

Members of the jury need not agree on what particular evidence supports a negative answer to Special Issue No. 1.

It is not required that the State prove Special Issue No. 1 beyond all possible doubt; it is required that the State's proof excludes all "reasonable doubt" concerning the defendant.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the

case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

The State must prove Special Issue No. 2 submitted to you beyond a reasonable doubt, and you shall return a Special Verdict of "YES" or "NO" on Special Issue No. 2.

In deliberating on Special Issue No. 2 you shall consider all the evidence admitted at the guilt or innocence stage and the punishment stage of trial, including evidence of the defendant's background, character, or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

You may not answer Special Issue No. 2 "YES" unless you agree unanimously.

You may not answer Special Issue No. 2 "NO" unless ten (10) or more jurors agree.

Members of the jury need not agree on what particular evidence supports a negative answer to Special Issue No. 2.

It is not required that the State prove Special Issue No. 2 beyond all possible doubt; it is

required that the State's proof excludes all "reasonable doubt" concerning the defendant.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

You are instructed that if you return an affirmative finding, that is a "YES" answer, to Special Issue No. 1 and Special Issue No. 2, and only then, are you to answer Special Issue No. 3.

You are instructed that in answering special Issue No. 3, you shall answer the issue "YES" or "NO." Neither side has the burden of proof on Special Issue No. 3.

You may not answer Special issue No. 3 "NO" unless you agree unanimously, and you may not answer Special Issue No. 3 "YES" unless ten (10) or more of you agree to do so.

You need not agree on what particular evidence supports an affirmative finding on Special Issue No. 3.

In answering Special Issue No. 3 you shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness, including evidence of the defendant's background, character, or the circumstances of the offense that mitigates against the imposition of the death penalty.

You may consider evidence of an extraneous crime or bad act in answering the special issues even if the defendant has not yet been charged with or finally convicted of the crime or act. However, you may consider such evidence only if the extraneous crime or bad act has been shown by the State beyond a reasonable doubt to have been committed by the defendant.

The law does not require a defendant to prove his innocence of any extraneous offense or act of misconduct at the punishment phase of his trial or produce any evidence at all at the punishment phase of his trial. The presumption of innocence alone is sufficient for you to find that the defendant did not engage in the extraneous offense or act of misconduct that has been placed in evidence unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt or responsibility therefor after careful and impartial consideration of all the evidence in the case.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most

important of his own affairs. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

Therefore, if you find and believe beyond a reasonable doubt that the defendant committed an extraneous crime or bad act, then you may consider such evidence in answering the special issues. However, if you have a reasonable doubt that the defendant committed an extraneous crime or bad act then you may not consider such evidence in answering the special issues.

During your deliberations, you are not to consider or discuss the possible actions of the Board of Pardons and Paroles or the governor, nor consider how long a defendant would be required to serve on a sentence of life imprisonment, nor how the parole laws would be applied to this defendant.

You are instructed that the defendant may testify in his own behalf if he chooses to do so, but if he elects not to do so, that fact cannot be taken by you as a circumstance against him nor prejudice him in any way. The defendant has elected not to testify in this punishment phase of trial, and you are instructed that you cannot and must not refer to or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever.

During your deliberations upon the "Special Issues," you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal

knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

In arriving at the answers to the "Special Issues" submitted, it will not be proper for you to fix the same by lot, chance, or any other method than by a full, fair and free exchange of the opinion of each individual juror.

After the reading of this charge, you shall not be permitted to separate from each other, nor shall you talk with anyone not of your jury. After argument of counsel, you will retire and consider your answers to the "Special Issues" submitted to you. It is the duty of your Foreman to preside in the jury room and vote with you on the answers to the "Special Issues" submitted.

You are the exclusive judges of the facts proved and the credibility of the witnesses and the weight to be given to their testimony, but you are bound to receive the law from the Court which has been given you and you are bound thereby.

/s/ Debbie M. Stricklin
Debbie Mantooth Stricklin,
Judge
180th District Court
Harris County, Texas

(4)

Supreme Court, U.S.
FILED
JUL 7 - 2008
OFFICE OF THE CLERK

No. 07-1383

In The

Supreme Court of the United States

SHOZDIJIJI SHISINDAY, a.k.a. Danny Dean Thomas,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

This is a capital case.

QUESTIONS PRESENTED

1. ShisInday's first conviction was overturned pursuant to *Riggins v. Nevada*, 504 U.S. 127 (1992), because the trial court failed to submit findings of fact to justify forcibly medicating ShisInday. During ShisInday's second trial sixteen years later, the State read into the record testimony from Ernest Gilliam, who testified at the first trial but subsequently passed away. Gilliam had merely testified that he sold the murder weapon to ShisInday. Assuming *arguendo* that this combination of circumstances resulted in a violation of ShisInday's right to confrontation, is this violation subject to a harmless error analysis? If so, was the admission of Gilliam's testimony harmless considering that it was cumulative of other evidence proving ShisInday was in possession of the gun and that ShisInday confessed to committing murder?

2. The trial court refused to instruct the jury regarding the consequences of a deadlock, over ShisInday's objections. Texas law forbids the trial court from doing so. For the first time in federal court, ShisInday challenges the Texas statutory sentencing scheme. Does this Court lack jurisdiction to consider ShisInday's claim that the statute is unconstitutional for containing this prohibition? If not, is ShisInday's claim barred pursuant to *Teague v. Lane*, 489 U.S. 288 (1989), and foreclosed under *Jones v. United States*, 527 U.S. 373 (1999)?

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I. The District Court's Denial of ShisInday's Confrontation Clause Claim Is Not Debatable. Even If The Trial Court Erroneously Admitted Ernest Gilliam's Testimony During ShisInday's Second Trial, That Ruling Is Subject To A Harmless Error Analysis. And Given The Substantial Evidence Of ShisInday's Guilt, Any Error Was Clearly Harmless. Therefore, Certiorari Review Is Not Warranted. 9

A. ShisInday is actually claiming that a Confrontation Clause violation occurred, not *Riggins* error. In fact, *Riggins* has no application to ShisInday's second trial because the *Riggins* error was cured when ShisInday received a new trial. Thus, any error pertaining to retrial must be assessed for harmlessness. . . . 11

B. The harmless error doctrine applies to ShisInday's claim; *Crawford v. Washington* does not alter that rule. 14

C. Any error was unquestionably harmless given the substantial evidence of ShisInday's guilt. 18

II. This Court Does Not Have Jurisdiction To Consider ShisInday's Claim That The Texas Statutory Sentencing Scheme Is Unconstitutional Because He Failed To Present That Claim To The Fifth Circuit. Regardless, His Allegation Is *Teague* Barred And Foreclosed Under *Jones v. United States*. 23

A. This Court lacks jurisdiction to consider the instant claim. 24

B. Regardless, ShisInday is requesting a new rule of constitutional law striking down the Texas statutory scheme for not requiring courts to instruct jurors on the consequences of a deadlock, although this Court has held that such a rule is not relevant to a jury's role in sentencing. 25

C. ShisInday's argument that *Jones* is factually distinct from his case and, thus, should not apply is ineffectual. *Jones* did not hold that an instruction regarding the consequences of a deadlock must be given in certain cases. And even if it did, this would not be one of those cases because the Texas statutory scheme does not mislead jurors. 28

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Petitioner Shozdijiji ShisInday, a.k.a. Danny Dean Thomas,[1] resides on Texas's death row for the brutal murder of Sylvia Harrison. He now challenges his conviction pursuant to 28 U.S.C. §§ 2241 and 2254, arguing that (1) the admission of testimony from a deceased witness during his second trial violated his constitutional rights, and (2) the Texas statutory punishment scheme is unconstitutional because it precludes a jury from being informed of the consequences of a deadlock. However, certiorari review is unwarranted.

ShisInday's original 1982 conviction was reversed pursuant to *Riggins v. Nevada*, 504 U.S. 127 (1992), because the trial court failed to submit any findings to support the forced medication of ShisInday, who was suffering from psychosis at the time. At ShisInday's second trial sixteen years later, the testimony from Ernest Gilliam, who was a witness at the first trial but died during the interim, was read into the record. ShisInday claims that the admission of this evidence violated his right to confrontation under *Riggins* because he was unable to adequately cross-examine Gilliam at his first trial due to his medicated state. ShisInday further argues that a harmless-error standard does not apply under *Riggins*. But *Riggins* is now irrelevant. The *Riggins* error was cured when ShisInday received a new trial, and ShisInday was not medicated during his second trial. Therefore, if any error occurred from the reading of Gilliam's testimony, it is subject to a harmless-error analysis, as are all Confrontation Clause allegations. And, as the lower courts determined, any error was

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[1] Respondent Nathaniel Quarterman is referred to as "the Director."

certainly harmless. Gilliam's testimony merely established that ShisInday purchased the murder weapon. This was cumulative evidence because several other witnesses testified that ShisInday was in possession of the firearm shortly before he murdered Harrison. Further, the gun was found in ShisInday's car covered in Harrison's blood, and he confessed to the murder. Thus, the Fifth Circuit's conclusion – that the district court's resolution of this claim is not subject to debate – is appropriate.

ShisInday also argued in the lower courts that the trial court violated his due-process rights during punishment by instructing the jury to continue deliberating after the jury informed the court that it was deadlocked. ShisInday claimed that the court's instructions were coercive in light of the fact that the court failed to instruct the jurors that a deadlock would result in a life sentence. However, ShisInday now argues that the Texas statutory sentencing scheme is unconstitutional because it prohibits a court from informing the jury of the consequences of the failure to agree on the special issues. ShisInday did not challenge the statute in his application for a certificate of appealability ("COA") in the Fifth Circuit; therefore, this Court lacks jurisdiction to consider the allegation. However, even if this Court could review the claim, this Court has never held that the statute is unconstitutional. ShisInday is asking this Court to apply retroactively a new rule of constitutional law, which would be barred pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). Moreover, in *Jones v. United States*, 527 U.S. 373 (1999), this Court determined that a trial court is not required to instruct the jury on the consequences of a deadlock because that information has no bearing on a jury's role

in the sentencing process. Therefore, ShisInday's claim lacks any merit, and this Court should deny certiorari review.

JURISDICTION

Under 28 U.S.C. § 1254(1), the Court lacks jurisdiction to consider ShisInday's constitutional challenge to the Texas statutory sentencing scheme because it was not "'pressed [in] or passed on' by the Court of Appeals." *United States v. Wells*, 519 U.S. 482, 488 (1997) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992) (brackets in *Wells*)). ShisInday also presents a new argument that, under *Crawford v. Washington*, 541 U.S. 36 (2004), Confrontation Clause error is structural and, thus, not subject to a harmless error analysis. Because the Fifth Circuit did not have an opportunity to address that issue, this Court lacks jurisdiction to consider it. The remainder of ShisInday's allegations are properly before the Court.

STATEMENT OF THE CASE

I. Facts of the Crime

The United States Court of Appeals for the Fifth Circuit summarized the relevant facts of the case as follows:[2]

> The evidence at the guilt/innocence phase of trial revealed that in July of 1981, ShisInday and his girlfriend, Phoebe, were

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[2] The summary is taken from the Texas Court of Criminal Appeals's and federal district court's opinions.

staying at the home of James Peels, his two sons, fifteen-year old Doyle Peels and seventeen-year-old Zendal Peels, and Martha Ann Tarver. On July 17, ShisInday gave Doyle a ride in his 1969 black-and-white Cadillac to pick up Doyle's work schedule at K-Mart. ShisInday entered the store with Doyle and purchased some ammunition in the sporting goods department. Later that evening, ShisInday, accompanied by Zendal, drove Doyle and Ronald McHenry to the skating rink.

According to ShisInday's July 9th transcribed statement and testimony from other witnesses, ShisInday and Zendal went shopping at a Safeway store after dropping the boys off at the rink. As they were leaving the store, they spotted nineteen-year-old Sylvia Harrison who was having car trouble. They stopped to help her, and ShisInday determined that she needed a new fan belt. They drove her across the street to an auto parts store, purchased the belt, and put it on her car. Harrison asked ShisInday and Zendal to follow her down the street to her house to make sure her car did not overheat again. Once they arrived, ShisInday fixed a leak in her car's "heater hose." She offered them a beer and invited them into the house. They sat in her living room, drank beer, and smoked some marijuana.

According to ShisInday's statement to the police, Zendal unexpectedly hit Harrison in the side of the head with ShisInday's gun, which Zendal had concealed in a paper bag. They carried Harrison, unconscious, out to the car and shoved her down on the passenger-side floorboard. They also took several items from her house including her telephone and eye glasses. ShisInday drove away with Zendal sitting in the passenger seat. Harrison regained consciousness, kicked the steering wheel, and bit ShisInday's hand. ShisInday told Zendal to grab her, and Zendal hit her in the head again with the gun, knocking her out. She regained consciousness again, and Zendal repeatedly hit her in the head with his knife until she passed out. She came to once more and began repeating, "God help me." ShisInday got his gun, put it to the side of her head, and shot her one time. They drove her to a bridge near the river and picked up some cinder blocks. They then drove to a more secluded bridge and parked under one of the support pillars. ShisInday looked around to see if anyone was nearby. Zendal removed Harrison's clothes and cut off her bra. After tying cinder blocks to Harrison's feet and neck with a rope, they dumped her in the San Jacinto River. ShisInday broke off a willow branch and brushed away their footprints as they returned to the car. They drove to a grocery store parking lot where they threw Harrison's clothes and other personal items

in a dumpster. Then they went to a car wash and washed the outside and inside of the car, particularly the floorboard, which was covered in blood.

After disposing of Ms. Harrison's body, Zendal and ShisInday returned to the Peels' home between four and five a.m. Zendal Peels' father accused ShisInday and Zendal of being late because they were smoking pot. ShisInday explained that they had car trouble. ShisInday then went to sleep in a back bedroom with his girlfriend.

The Peels family soon discovered blood on the outside and inside of ShisInday's vehicle. ShisInday's girlfriend woke him up in the morning and confronted him about the blood. ShisInday claimed that he ran over a dog, put it in his car, and mercifully killed the dog to end its suffering. ShisInday told the same story to the Peels family. When the Peels and ShisInday's girlfriend did not believe his story, ShisInday decided to leave. Before going, ShisInday threatened Zendal "[i]f I go down, you are going down with me because you are in this with me."

ShisInday, who had a long history of mental problems, soon sought treatment at a psychiatric hospital claiming that others accused him of killing a person when he actually killed a dog. After talking to Zendal Peels, and going to Ms. Harrison's

> residence and finding that there had been a fire, the police arrested ShisInday at around 1:00 a.m. at the hospital. ShisInday initially repeated his dog story to the police, but he later confessed to killing Ms. Harrison.

ShisInday v. Quarterman, 511 F.3d 514, 517-19 (5th Cir. 2007); Petition, Appendix A at 2-5

II. Trial, Direct Appeal, and Postconviction Proceedings

ShisInday was twice convicted and assessed the death penalty for the July 1981 capital murder of nineteen-year-old Sylvia Harrison. His first conviction was reversed and vacated by a federal district court in 1997 under *Riggins v. Nevada*. *See Thomas v. Johnson*, No. H-95-5236 (S.D. Tex. July 2, 1997); Petition, Appendix E.

In his 1998 retrial, a second jury found ShisInday guilty of capital murder, CR 409,[3] and answered the punishment-phase special issues that resulted in ShisInday's second death sentence. *Id.* at 426-29, 441. The Texas Court of Criminal Appeals affirmed the

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[3] "CR" refers to the clerk's record of pleadings and documents filed with the court during trial, followed by page number(s). "RR" refers to the reporter's record of the evidence and testimony presented at trial, preceded by volume number and followed by page number(s). "SX" refers to the State's Exhibits admitted at trial, followed by exhibit number(s) "SHCR" refers to the state habeas record, followed by page number(s).

conviction and sentence on direct appeal in an unpublished opinion. *ShisInday v. State*, No. 73,351 (Tex. Crim. App. Sept. 12, 2001); Petition, Appendix D.

On state habeas review, the trial court entered findings of fact and conclusions of law recommending denial, SHCR 2113-91, which the Court of Criminal Appeals adopted in an unpublished, per curiam order. *Ex parte Danny Dean Thomas a.k.a. Shozdijiji ShisInday*, No. 15,153-07 (Tex. Crim. App. March 9, 2005); Petition, Appendix F.

ShisInday timely initiated federal habeas corpus proceedings. Following review, the federal district court denied habeas relief and denied a COA. *ShisInday v. Quarterman*, No. H-06-814, 2007 WL 776680 (S.D. Tex. March 9, 2007); Petition, Appendix C. ShisInday filed an application for a COA in the Fifth Circuit on July 12, 2007. The appellate court denied ShisInday a COA in a published opinion on December 20, 2007. Petition, Appendix A. The instant petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT

I. The District Court's Denial Of ShisInday's Confrontation Clause Claim Is Not Debatable. Even If The Trial Court Erroneously Admitted Ernest Gilliam's Testimony During ShisInday's Second Trial, That Ruling Is Subject To A Harmless Error Analysis. And Given The Substantial Evidence Of ShisInday's Guilt, Any Error Was Clearly Harmless. Therefore, Certiorari Review Is Not Warranted.

ShisInday argues that the lower courts improperly applied a harmless-error analysis to reject his underlying Confrontation Clause claim. ShisInday points to the reversal of his first trial under *Riggins v. Nevada* and alleges that because he was unable to confront witness Ernest Gilliam at the first trial due to the effects of forced medication, the admission of Gilliam's testimony in his second trial was constitutionally deficient for the same reason. Petition at 12-27.

On July 2, 1997, the federal district court ordered ShisInday's 1982 conviction set aside under *Riggins* based on the lack of trial-court findings in the record to justify that ShisInday's prescribed treatment with antipsychotic drugs was medically appropriate and necessary for the sake of ShisInday's safety or the safety of others. Petition, Appendix E. Prior to granting relief, the district court addressed and found meritless ShisInday's other twenty-seven grounds for federal habeas relief, including a competency allegation. *See Thomas v. Johnson*, No. H-95-5236. In denying that claim, the district court noted: "[ShisInday] was found competent to stand trial. He was found to have the

ability to consult with his lawyer with a reasonable degree of rational understanding, and was found to have a rational as well as factual understanding of the proceedings against him." *Id.*, slip op. at 31-32; *see also* SHCR 1309-10 (State's Exhibit "B").

During ShisInday's retrial in 1998, the State offered the 1982 testimony of Ernest Gilliam, along with a death certificate showing that Gilliam had passed away. Petition, Appendices N & O. ShisInday objected to the admission of the testimony on the ground that he lacked the ability to cross-examine Gilliam during the first trial due to his medicated state. *Id.* at Appendix O. The trial court overruled the objection, and the State read Gilliam's testimony to the jury. *Id.* The testimony was brief: in short, Gilliam stated that he knew ShisInday and that he recognized State's Exhibit 10 as the .25 automatic pistol he owned and later sold to ShisInday for fifty dollars in July 1981. *Id.* at Appendix N. Gilliam testified on cross-examination that the gun had one clip when he sold it to ShisInday. *Id.* Neither party asked Gilliam any further questions.

ShisInday now offers a three-part argument pertaining to his underlying Confrontation Clause allegation: (1) the *Riggins* violation that affected his first trial essentially carried over to his second when Gilliam's testimony was admitted; (2) Confrontation Clause violations should not be subject to a harmless-error analysis under *Crawford v. Washington*; and (3) the admission of Gilliam's testimony was not harmless. Petition at 14-27. These arguments are meritless.

A. ShisInday is actually claiming that a Confrontation Clause violation occurred, not *Riggins* error. In fact, *Riggins* has no application to ShisInday's second trial because the *Riggins* error was cured when ShisInday received a new trial. Thus, any error pertaining to retrial must be assessed for harmlessness.

ShisInday's *Riggins* argument is as follows: a harmless-error analysis does not apply to a *Riggins* violation; therefore, because *Riggins* error occurred during his first trial, the admission of any evidence during his second trial that was taken from his first cannot be harmless. Petition at 14-17. In other words, ShisInday is attempting to bootstrap *Riggins* to his second trial. His claim is flawed on several fronts.

In *Riggins*, the defendant, who was on trial for robbery and murder, suffered from psychosis. 504 U.S. at 129-31. Riggins was involuntarily medicated throughout trial without explanation from the trial court why medication was necessary. *Id.* at 131. Riggins moved to terminate medication, but the court denied that request. *Id.* At trial, Riggins pleaded insanity and testified on his own behalf. *Id.* This Court ultimately reversed, holding that the trial court failed to acknowledge Riggins's liberty interest in being free from unwanted antipsychotic drugs. *Id.* at 137. Considering reports from various doctors, the Court determined that the side effects of this medication might have altered Riggins's appearance, the content of his testimony, his ability to follow the trial proceedings, or his ability to consult with counsel. *Id.* The Court also rejected the argument that Riggins needed to show how

he was harmed by the forced medication. "Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative." *Id.* The Court concluded that because the record was devoid of findings "that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy ... we have no basis for saying that the substantial probability of trial prejudice in this case was justified." *Id.* at 138.

Therefore, a harmless-error analysis did not apply to Riggins because the Court had no way of determining, even at the very least, the nature of the error that might have occurred. Indeed, Riggins did not allege specific constitutional violations; he generically claimed that forced administration of antipsychotics denied him the ability to assist in his defense and "prejudicially affected his attitude, appearance, and demeanor at trial." *Id.* at 131.

But that is not the case here. ShisInday has made it clear that he is alleging a Confrontation Clause violation pertaining to the admission of Gilliam's testimony. This is a claim that can be assessed for harmless error. For example, the record does not contain any evidence that ShisInday was actually unable to assist in the cross-examination of Gilliam due to being medicated at his 1982 trial. The district court correctly noted that "ShisInday offers no compelling area in which he could have cross-examined Mr. Gilliam differently than his attorneys did in the first trial. ShisInday makes no showing that deeper cross-examination of Mr. Gilliam in the second trial would have lessened the incriminating

nature of his testimony." Petition, Appendix C at 46. Moreover, the federal district court's original reversal under *Riggins* was based solely on the trial court's failure to make the factual findings necessary to justify ShisInday's medication, not that ShisInday was incompetent to confront Gilliam. *Id.*, Appendix E. In fact, as shown above, the federal district court found that ShisInday was competent to stand trial and that he was capable of assisting his attorneys in cross-examining the witnesses.

Be that as it may, even if Gilliam's 1982 testimony was tainted under *Riggins*, this does not save ShisInday. The fatal flaw in ShisInday's argument is that he is focused on the wrong trial. In other words, the issue is not whether ShisInday's confrontation rights were impeded during his first trial when he was on antipsychotics, but whether the reading of Gilliam's testimony at ShisInday's second trial transgressed those rights. ShisInday was not medicated the second time around, so *Riggins* is no longer relevant. Therefore, this is strictly a Confrontation Clause claim pertaining to the admission of evidence during retrial. Consequently, as discussed below, a harmless-error analysis absolutely applies.[4]

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[4] Although, the Director is assuming *arguendo* that error occurred, he is not conceding this point. Gilliam's testimony was debatably admissible under the Texas Rules of Evidence, Rule 804(b)(1), former testimony from an unavailable declarant whom the defendant had an *opportunity* to cross-examine. As shown above, the record indicates that ShisInday was not denied an opportunity to develop Gilliam's 1982 testimony through cross-examination, despite ShisInday's medicated state. Nonetheless, because this case

ShisInday offers the novel argument that his second trial was, in essence, a continuation of the first and, consequently, that *Riggins* affects both. Petition at 16. ShisInday disregards that the *Riggins* error was cured when he received a second trial and that the two trials were sixteen years apart. Moreover, this Court has never held that *Riggins* error, nor any error for that matter, carries over from one trial to another. And ShisInday cites to no precedent holding that a second trial constitutes a continuation of the first. The adoption of ShisInday's argument would require the creation of a new rule constitutional law barred under *Teague v. Lane*, 489 U.S. at 310. It would also lead to the absurd result of never-ending trials and render meaningless the states's interest in finality. In short, this is not a legitimate reason for granting certiorari review.

B. The harmless error doctrine applies to ShisInday's claim; *Crawford v. Washington* does not alter that rule.

Assuming that the trial court erroneously admitted Gilliam's testimony at ShisInday's second trial, ShisInday must establish harm to obtain federal habeas corpus relief. This Court has repeatedly held that Confrontation Clause violations are subject to a harmless-error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Olden v. Kentucky*, 488 U.S. 227, 232-33 (1988); *Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1988); *Neder v. United States*, 527 U.S. 1, 18 (1999); *Lilly v. Virginia*, 527 U.S. 116, 139-40 (1999). Moreover, under *Brecht v. Abrahamson*, federal habeas relief may not be granted for trial error

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can be more easily resolved on the harmless-error issue, the Director will not brief this matter any further.

that, although of constitutional magnitude, did not have a "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. 619, 637-38 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

ShisInday argues that the Court's holding in *Crawford* "requires reconsideration of the use of harmless error analysis in relation to the Confrontation Clause." Petition at 18. In *Crawford*, this Court held that the admission of a wife's out-of-court statements to police officers, regarding an incident in which the defendant, her husband, allegedly stabbed the victim, violated the Confrontation Clause. The Court held that it was irrelevant whether the wife's statements were deemed reliable by the trial court because the statements were testimonial and the defendant was not given prior opportunity to cross-examine his wife. 541 U.S. at 66-68. ShisInday now contends that *Crawford* distinguishes Confrontation Clause allegations from other trial errors because this Court stated that the lack of opportunity to cross-examine "alone is sufficient to make out a violation of the Sixth Amendment." *Id.* at 68. ShisInday also argues that violations of the Confrontation Clause are different because "[t]here is no way to reliably quantify or predict what would have happened" had he been able to cross-examine Gilliam. Petition at 19. Although Gilliam was cross-examined at ShisInday's first trial, ShisInday's argument fails for five additional reasons.

First, the Court lacks jurisdiction to even consider this claim. ShisInday did not claim in his application for a COA that *Crawford* altered the settled rule that Confrontation Clause allegations are subject to a harmless-error analysis. Petition, Appendix A at 15-17.

His claim pertained solely to *Riggins*. Therefore, under 28 U.S.C. § 1254(1), this Court cannot consider ShisInday's "structural error" allegation because it was not "'pressed [in] or passed on' by the Court of Appeals." *Wells*, 519 U.S. at 488 (quoting *Williams*, 504 U.S. at 41).

Second, ShisInday is completely misreading *Crawford*. The *Crawford* Court only concluded that an indicia-of-reliability test does not apply to testimonial statements. The Court did not reach the issue of harmless error at all. Indeed, the Court did not reverse Crawford's conviction; it reversed the decision of the Washington Supreme Court that the challenged testimony was reliable and remanded the case to that court "for further proceedings not inconsistent with this opinion." *Crawford*, 541 U.S. at 69. Also, the Washington Supreme Court did not reach the issue of harmless error when it previously reinstated Crawford's conviction. *State v. Crawford*, 54 P.3d 656 (Wash. 2002). Implicit in the Court's remand is that the Washington Supreme Court determine whether the error was harmless. For example, in *Lilly v. Virginia*, this Court held that a defendant's right to confrontation was violated and concluded: "Adhering to our general custom of allowing state courts initially to assess the effect of erroneously admitted evidence in light of substantive state criminal law, we leave it to the Virginia courts to consider in the first instance whether this Sixth Amendment error was 'harmless beyond a reasonable doubt.'" 527 U.S. at 139-40 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). Then, as in *Crawford*, the Court remanded the case for further proceedings. *Id.* at 140. ShisInday, therefore, cannot rely on *Crawford* to overcome the harmless-error question. *See Texas v. Cobb*, 532 U.S. 162, 169 (2001) ("Constitutional rights are

not defined by inferences from opinions which did not address the question at issue.").

Third, assuming for a moment that *Crawford* announced a new rule beneficial to ShisInday, he still could not rely on it. In *Whorton v. Bockting*, 127 S. Ct. 1173, 1183-84 (2007), this Court held that *Crawford* does not apply retroactively to cases on collateral review.

Fourth, this Court has already addressed ShisInday's concern about the impact on a trial stemming from a defendant's inability to confront a witness. In *Coy v. Iowa*, this Court recognized that an assessment of harmlessness with regard to Confrontation Clause violations requires a particular approach. The assessment "cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation" because that involves speculation. 487 U.S. at 1021-22. "[H]armlessness must therefore be determined on the basis of the remaining evidence." *Id.* at 1022. Consequently, *Coy* undermines ShisInday's belief that courts "cannot determine, without cross-examination, what impact unconfronted testimony had on a trial overall." Petition at 20.

Fifth, in *Arizona v. Fulminante*, 499 U.S. 279 (1991), this Court divided constitutional error into two classes: trial error and structural defects. *Id.* at 307-08. Trial errors are those that occur during the presentation of the case to the jury and include most constitutional errors. *Id.* at 306-07. They may "be quantitatively assessed in the context of other evidence presented in order to determine whether [the admission of evidence] was harmless beyond a reasonable doubt." *Id.* at 307-08.

The error ShisInday alleges clearly falls into this category because it pertains to his alleged inability to confront a witness. Only a handful of errors amount to structural defects. These include the denial of counsel, the denial of counsel of choice, the denial of self-representation, the denial of a right to a public trial, and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction. *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 (2006). This Court has never held that Confrontation Clause errors are of this ilk. ShisInday is arguing that *Van Arsdall*, et al., should be overruled, which is a request for a new rule of constitutional law. Therefore, this claim, like the *Riggins* allegation above, is barred under *Teague v. Lane*.

C. Any error was unquestionably harmless given the substantial evidence of ShisInday's guilt.

Both the Fifth Circuit and federal district court determined that any Confrontation Clause violation was harmless under *Brecht v. Abrahamson*. Petition, Appendix A at 16-17, Appendix C at 45-46. This is not a debatable conclusion.

Indisputably, Gilliam's testimony that he sold the gun to ShisInday was not significant. The gun — introduced as State's Exhibit 10 — had already been identified as ShisInday's gun by Martha Tarver, Doyle Peels, and Peels' friend, Ronald McHenry. 15 RR 55-56, 97, 119-20. The gun was seen in ShisInday's possession shortly before Harrison's murder, *id.*, and it was recovered from the driver's side floorboard of ShisInday's car covered in blood. *Id.* at 41; 17 RR 123; 18 RR 111. The blood on the gun matched Harrison's DNA profile. 18

RR 223. Blood was also found on both the inside and outside of the car. 15 RR 40-41; 17 RR 122; 18 RR 110. When the police picked up ShisInday in Galveston, he appeared to have blood stains on his shirt and pants. 17 RR 105. Further, a neighbor confirmed seeing Shisinday's car in Harrison's driveway until approximately midnight, when he noticed smoke and a flash of orange coming from Harrison's home, later determined to have been an intentional fire set in the living room and bedroom. 15 RR 162-64, 183-87.

The most significant evidence presented at trial was, of course, ShisInday's confession. SX 40; 17 RR 217-39. ShisInday became visibly upset when the police showed him a morgue photograph of Sylvia Harrison. 17 RR 109, 208. He asked officer Johnny Freeze if they could talk for a moment, and then he volunteered that he murdered Harrison. 17 RR 111. ShisInday's written confession, which is extremely lengthy and took several hours to compose, followed. *Id.* at 112, 217-39; SX 40. The details of his confession were confirmed when the police found Sylvia Harrison's nude body and conducted their investigation. For example, the police discovered her body submerged in the San Jacinto River. 17 RR 187-97. Just as ShisInday stated, cinder blocks had been tied to her ankles and neck. *Id.* at 196-97. She had been shot in the head, and she sustained numerous contusions and three stab wounds to the face, consistent with Peels "hitting" Harrison in the head with his knife. 18 RR 144-48. Further, Harrison's clothes and personal items were found in the dumpster ShisInday mentioned. *Id.* at 65-73. The condition of her clothes revealed that they had, in fact, been cut off. *Id.* When the police searched ShisInday's car, they found – aside from the gun – a white and orange tinted rope, a knife, and a fan belt cover

in the trunk. *Id.* at 109-13; 17 RR 180. At Harrison's home, the police noticed a new fan belt on her car. 17 RR 84. Inside her purse was a receipt for a fan belt. *Id.* at 85. The owner of an auto parts store testified that Harrison came into the store with two men and purchased the belt. *Id.* at 180. Finally, ShisInday had a noticeable human bite mark on his finger, which he initially claimed was a dog bite. 15 RR 37-38.

In short, the evidence of ShisInday's guilt is substantial. Nonetheless, ShisInday contends that Gilliam's testimony was harmful because the other testimony linking him to the gun was tainted by the personal connections of the witnesses to Peels. Petition at 24. However, this is merely supposition; ShisInday has provided nothing to show that this testimony was unreliable simply because some of the witnesses are related to Zendal Peels. Regardless, as the district court noted, Ronald McHenry is not related to the Peels family. Petition, Appendix C at 45. Although ShisInday argues that McHenry is a friend of the family, Petition at 24 n.6, ShisInday has not demonstrated that this somehow taints McHenry's testimony. Moreover, all of these witnesses were cross-examined regarding their association to Peels. 15 RR 60-61, 106, 114, 127. Thus, the jury was not oblivious to these facts.

More importantly, Gilliam's testimony was trivial because ShisInday's ownership of the gun lacks direct relevance to his conviction. The issue is not whether ShisInday bought the gun from Gilliam, but whether ShisInday shot and killed Harrison. Considering ShisInday's confession, that the gun was found in his car covered in Harrison's blood, and the other evidence discussed above, ShisInday's guilt for committing capital

murder is not in doubt. Therefore, Gilliam's testimony did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637-38.

ShisInday also claims that any error was harmful because he "argued" before the jury that his confession was not reliable. Petition at 25. This is a meritless point. The trial court held a suppression hearing and concluded that ShisInday's confession was properly obtained and admissible. 16 RR 1-101. Subsequently, the Court of Criminal Appeals, federal district court, and Fifth Circuit all determined that ShisInday's confession was not acquired through coercive state action. Petition, Appendix A at 11-14, Appendix C at 63-68, Appendix D at 13-21.

Next, ShisInday contends that the Fifth Circuit erred in placing the burden on him to establish harm. Petition at 25. He is apparently referring to the following language in the Fifth Circuit's opinion: "ShisInday argues that when a petitioner establishes a *Riggins* violation, he need not prove prejudice or harm to obtain relief. We disagree."[5] Petition, Appendix A at 16. ShisInday is misconstruing this statement, which was merely a brief response to *his* allegation. The Fifth Circuit did not explicitly assign a burden of proof to ShisInday. This is demonstrated by the court's conclusion: "Based on *our review* of the record, we agree with the Court of Criminal Appeals that the evidence was cumulative of other

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[5] Because the Fifth Circuit resolved ShisInday's claim under a harmless-error analysis, it did not consider whether a *Riggins* violation occurred or whether ShisInday's claim could even be characterized as such.

properly admitted evidence and thus its admission did not have a substantial and injurious effect on the verdict." *Id.* at 17 (emphasis added). The appellate court's approach is entirely consistent with *O'Neal v. McAninch*, 513 U.S. 432, 436-37 (1995), in which this Court – addressing the role of a judge who applies a harmless-error standard – asserted, "[W]e think it conceptually clearer for the judge to ask directly, 'Do I, the judge, think that the error substantially influenced the jury's decision?' than for the judge to try to put the same question in terms of proof burdens (*e.g.*, 'Do I believe the party has borne its burden of showing ...?')." Moreover, as in the instant case, "[n]ormally a record review will permit a judge to make up his or her mind about the matter." *Id.* at 435. It is only when that review leaves a judge in grave doubt about the likely effect of an error on the jury's verdict that the judge must treat the error as if it did affect the verdict. *Id.* This is not one of those cases, and the Fifth Circuit's analysis was proper.

Finally, ShisInday argues that this Court should grant certiorari review because lower courts have not consistently reconciled the harmless-error standard enunciated in *Van Arsdall* with that in *Brecht*. Petition at 25-27. However, in *Fry v. Pliler*, 127 S. Ct. 2321, 2325 (2007), this Court explained that *Brecht* "clearly assumed that the *Kotteakos* standard would apply in virtually all § 2254 cases." The only exception is for an "unusual case" where "a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct ... infect[s] the integrity of the proceeding." *Id.* (quoting *Brecht*, 507 U.S. at 638 n.9). This Court has never held, nor has ShisInday demonstrated, that an alleged Confrontation Clause violation falls into that category. Therefore, *Brecht* is

clearly the applicable standard. Once again, implicit in ShisInday's claim is a request for a new rule of constitutional law, which would be *Teague*-barred.

For all of the above reasons, the lower court's decision is not debatable, and certiorari review is not warranted.

II. This Court Does Not Have Jurisdiction To Consider ShisInday's Claim That The Texas Statutory Sentencing Scheme Is Unconstitutional Because He Failed To Present That Claim To The Fifth Circuit. Regardless, His Allegation Is *Teague*-Barred And Foreclosed Under *Jones v. United States*.

ShisInday claims that the statute under which he was sentenced to death, Article 37.0711 of the Texas Code of Criminal Procedure, is unconstitutional on its face and as applied to him. Petition at 27-37. To summarize ShisInday's claim, the statute provides that the jury is to return a "yes" or "no" answer to the deliberateness, future-dangerousness, and mitigation special issues. The jury may not answer "yes" to the deliberateness and future-dangerousness issues unless all jurors agree and may not answer "no" unless ten or more agree. With regard to mitigating circumstances, the jury may not answer that issue "no" unless all jurors agree and may not answer "yes" unless ten or more agree. Tex. Code Crim. Proc. art. 37.0711 § 3(b)-(f). The statute also states that if the jury is unable to answer any of the special issues, the court must sentence the defendant to life imprisonment. Tex. Code Crim. Proc. art. 37.0711 § 3(g). However, § 3(i) provides: "The court, the attorney for the state, or the attorney for the defendant may not inform a

juror or prospective juror of the effect of failure of the jury to agree on an issue submitted under this article." Tex. Code Crim. Proc. art. 37.0711 § 3(i).

ShisInday contends that "the prohibition of this part, 3(i), operating in conjunction with part 3(g)" is unconstitutional because it misleads jurors into believing that "a concurrence of ten or more is needed to answer a special issue in a way that will result in a life sentence, when in fact any one juror who believes that the prosecution has failed to meet its burden can effectively cause the imposition of a life sentence." Petition at 30. The result, ShisInday claims, is that a holdout juror who believes that life should be the appropriate sentence will tend to yield to the majority because the juror does not understand the impact his or her vote will have on the sentencing decision. Petition at 31-32. ShisInday further alleges that the statute worked to his detriment because the jury was deadlocked for several days and was instructed to continue deliberating. *Id.* For the following reasons, ShisInday's claim cannot succeed, and certiorari review is not warranted.

A. This Court lacks jurisdiction to consider the instant claim.

In the Fifth Circuit, ShisInday alleged that he was deprived of due process because the trial court instructed the jury to continue deliberating after receiving several notes that the jury was deadlocked. Petition, Appendix A at 14-15. ShisInday argued that the trial court's failure to instruct the jury that a deadlock would result in a life sentence, combined with the instruction that ten votes were needed for a life sentence and the instruction to continue deliberating, resulted in a coerced death

sentence. *Id.*

Thus, ShisInday's claim pertained to the trial court's instructions. He is now raising a specific allegation that the statute governing his punishment proceedings is unconstitutional. Petition at 27-37. Although there are similarities in the claims, ShisInday did not give the Fifth Circuit an opportunity to address the constitutionality of Article 37.0711. Moreover, ShisInday challenges the statute on Eighth Amendment grounds, not simply as a violation of due process. Petition at 32-37. This is a separate issue the lower courts did not resolve. Therefore, this Court lacks jurisdiction to review this claim under 28 U.S.C. § 1254(1) because it was not presented to or considered by the court of appeals. *Wells*, 519 U.S. at 488; *see also Clingman v. Beaver*, 544 U.S. 581, 598 (2005) ("We ordinarily do not consider claims neither raised nor decided below."); *Heath v. Alabama*, 474 U.S. 82, 87 (1985).

B. Regardless, ShisInday is requesting a new rule of constitutional law striking down the Texas statutory scheme for not requiring courts to instruct jurors on the consequences of a deadlock, although this Court has held that such a rule is not relevant to a jury's role in sentencing.

Lack of jurisdiction notwithstanding, this Court has never held that Article 37.0711 is unconstitutional for containing the "objectionable" language of § 3(i). *See Webb v. Collins*, 2 F.3d 93, 95-96 (5th Cir. 1993). Indeed,

this Court has repeatedly held that the Texas special issues pass constitutional muster. *Johnson v. Texas*, 509 U.S. 350, 360-361 (1993); *Franklin v. Lynaugh*, 487 U.S. 164, 182 (1988); *Jurek v. Texas*, 428 U.S. 262, 279 (1976). Moreover, the Texas Court of Criminal Appeals has concluded that the statutory language prohibiting jurors from being informed of the consequences of a deadlock is not unconstitutional. *Hughes v. State*, 897 S.W.2d 285, 301 (Tex. Crim. App. 1994); *Sterling v. State*, 830 S.W.2d 114, 121-22 (Tex. Crim. App. 1992); *Davis v. State*, 782 S.W.2d 211, 221-22 (Tex. Crim. App. 1989). Therefore, ShisInday's argument, which would require this Court to announce a new rule of constitutional law, is barred under *Teague v. Lane*.

Moreover, this Court has rejected the theory that a trial court's failure to instruct the jury as to the consequences of deadlock gives rise to an Eighth Amendment violation. In *Jones v. United States*, the capital defendant wished to inform the jury that the trial judge would impose a life sentence without parole if the jury could not reach a unanimous punishment verdict. 527 U.S. at 379. This Court noted that such issues do not involve the failure to provide the jury with mitigating evidence, but only whether the jury was misled as to its role in the sentencing process. *Id.* at 381-82. In rejecting this contention, the Court held:

> The truth of the matter is that the proposed instruction has no bearing on the jury's role in the sentencing process. Rather, it speaks to what happens in the event that these jury is unable to fulfill its role – when deliberations break down and the jury is unable to produce a unanimous

> sentence recommendation. Petitioner's argument, although less than clear, appears to be that a death sentence is arbitrary within the meaning of the Eighth Amendment if the jury is not given any bit of information that might possibly influence an individual juror's voting behavior. That contention has no merit. We have never suggested, for example, that the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process. On the contrary, we have long been of the view that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Allen v. United States,* 164 U.S. 492, 501 [] (1896).

Id. at 382. This Court also "recognized that in a capital sentencing proceeding, the Government has 'a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.'" *Id.* (quoting *Lowenfield v. Phelps,* 484 U.S. 231, 238 (1988)). Thus, the instruction ShisInday desires "might well have the effect of undermining this strong governmental interest." *Id.*

Further, the Court declined to require that this type of instruction be given in every capital case. The Court held: "'While this was a correct statement of law it concerned a procedural matter and was not one which should have been the subject of an instruction. It would have been an open invitation for the jury to avoid its responsibility and to disagree.'" *Id.* at 383-84 (quoting

Justus v. Virginia, 266 S.E.2d 87, 92 (1980)). Therefore, despite ShisInday's complaints, he has no constitutional right to the instruction. Consequently, *Jones* forecloses his challenge to the statute.

C. ShisInday's argument that *Jones* is factually distinct from his case and, thus, should not apply is ineffectual. *Jones* did not hold that an instruction regarding the consequences of a deadlock must be given in certain cases. And even if it did, this would not be one of those cases because the Texas statutory scheme does not mislead jurors.

Although ShisInday concedes that *Jones* addresses the issue he is raising, he contends that his case differs in several respects. First, he argues that *Jones* left open the possibility that the failure to instruct the jury as to the consequences of a deadlock could give rise to an Eighth Amendment problem if the jury was "affirmatively misled regarding its role in the sentencing process." *Jones*, 527 U.S. at 381-82 (quoting *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)); Petition at 33. ShisInday then states that the Texas statute is affirmatively misleading because, unlike the federal statute at issue in *Jones*, it requires the trial court to instruct the jury that a concurrence of ten jurors is needed to sentence a defendant to life although "one juror has the power to effect a life sentence." Petition at 33.

ShisInday's argument is wholly meritless. *Jones* proclaimed that a court's failure to give this instruction could lead to a constitutional dilemma *in theory*. *Jones*,

527 U.S. at 381. In practice, however, the refusal to do so does not mislead because it has no bearing on the jury's role in sentencing; rather, it pertains to a procedural matter in the event the jury cannot fulfill it's role. *Id.* at 382. Further, by quoting *Romano*, the *Jones* Court was, in essence, referring to its holding in *Caldwell v. Mississippi*, 472 U.S. 320 (1985).[6] In *Caldwell*, this Court held that a prosecutor misled the jury about its role in sentencing when he stated that the jury's responsibility for sentencing the defendant lay elsewhere. *Id.* at 336-40. But to establish a *Caldwell* violation, a petitioner must show that remarks to the jury improperly described the jury's role under state law. *Dugger v. Adams*, 489 U.S. 401, 407 (1989). That did not happen in ShisInday's case because the trial court's instructions conformed precisely with Texas law. ShisInday is complaining about what the court did not say regarding a deadlock, which, as *Jones* makes clear, is not required.

Importantly, the Court of Criminal Appeals has repeatedly pointed out the flaws in arguments, like ShisInday's, that the Texas 12-10 rule is misleading. In *Lawton v. State*, 913 S.W.2d 542, 559 (Tex. Crim. App. 1995), the court explained:

> [W]hile it is true that the jury is instructed that they may not answer any of the special issues in a manner that would result in a life sentence unless ten jurors agree to that answer, this instruction follows the instruction that the jury may not answer

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[6] The petitioner in *Romano* argued that he should be granted relief pursuant to *Caldwell*. *Romano*, 512 U.S. at 8-10.

> any of the special issues in a manner resulting in capital punishment unless the verdict is unanimous. Under these facts, appellant's argument that jurors will be misled lacks merit; every juror knows that capital punishment cannot be imposed without the unanimous agreement of the jury on all three special issues. The jury is not informed of the consequences of a hung jury, *but each juror will know that without his or her vote the death sentence cannot be imposed.*

Id. at 559 (emphasis added). And in *Draughon v. State*, 831 S.W.2d 331 (Tex. Crim. App. 1992), the court correctly held that a defendant has no right for the jury to be told of the consequences of their failure to agree because "[a]bstention is not a jury option. Rather ... it is merely a consequence of the jury's inability to exercise its available options by reaching a verdict. It is not, nor would it be appropriate to suggest that it is, a verdict itself." *Id.* at 338. Thus, ShisInday's argument that the statute misinforms jurors about their role has no basis in law or fact.

Second, ShisInday contends that *Jones* differs because this Court held that lower courts are not required in every capital case to give an instruction regarding the consequences of a deadlock, whereas Texas law "prohibits the trial court from *ever* instructing the jury" in that manner. Petition at 33-34 (emphasis in original). This is a frivolous argument. Obviously, if such an instruction is not required, then a state can never run afoul of the Constitution by repeatedly refusing to give it. The *Jones* Court did not hold that a jury must, or even should,

receive the instruction in certain cases.

Third, ShisInday argues that the Texas statute, unlike the federal statute in *Jones*, appears to operate by mistake and not design. Petition at 34. Prior to 1981, in a capital case, a hung jury on punishment resulted in a mistrial. *See Padgett v. State*, 717 S.W.2d 55, 58 (Tex. Crim. App. 1986). In 1981, the Legislature amended the statute to require the imposition of a life sentence in the event of a hung jury. *Id.* The purpose of this change was to prevent the lengthy delays and expense of retrying a capital defendant. *Id.* The Legislature also added the provision banning the jury from receiving information about the consequences of a deadlock. *Id.* ShisInday argues, in essence, that the Legislature put no consideration into how the new amendments would conflict with, or "render obsolete," the 12-10 requirements. Petition at 35. ShisInday is incorrect because there is no conflict. As stated above, a deadlock-imposed life sentence is a procedural issue. It is not, and never has been, a sentencing option for a jury under Texas law. Moreover, there is no evidence that the Legislature ever intended a non-answer on a special issue to actually be an answer. *See Padgett*, 717 S.W.2d at 58. Although that is now the procedural outcome, the Legislature's obvious goal via the two amendments was to prevent retrials but not absolve the jury of its responsibility to answer the special issues.

And that is one the primary problems with ShisInday's claim: he fails to comprehend why Texas has the 12-10 rule and the prohibition against informing the jury of the consequences of a deadlock. The 12-10 rule was designed to stress juror unanimity and consensus either for or against a death sentence. It is "likely to

stimulate in jurors a more serious approach to their task by encouraging them to reach agreement through continued deliberation rather than to abandon hope of consensus prematurely." *Draughon*, 831 S.W.2d at 337. Moreover, "[t]he issues are framed in a manner which permits them to be answered either affirmatively or negatively, and it is the purpose of the deliberative process to resolve juror vacillation." *Nobles v. State*, 843 S.W.2d 503, 510 (Tex. Crim. App. 1992). This also discourages a juror from skirting his or her responsibility by failing to return a vote. *Id.* Additionally, although ShisInday complains that the rule somehow "coerces" a holdout juror into voting with the majority, the opposite could happen if a juror is aware of the consequences of a deadlock. In other words, "'a juror convinced of the appropriateness of a life sentence [might] refuse to consider the evidence and the views of other jurors in support of the death penalty, knowing that his blind obstinance would preforce result in a life sentence.'" *Davis*, 782 S.W.2d at 221 (quoting *Barfield v. Harris*, 540 F.Supp. 451, 472 n.17 (E.D.N.C. 1982)). Thus, as the *Jones* Court acknowledged, acceptance of ShisInday's argument would provide jurors an "open invitation" to abdicate their responsibilities in order to reach a desired outcome.

Fourth, and related to the above, ShisInday claims that the statute operates in an arbitrary manner because the ban of § 3(i) was lifted after 1991 but remains in place for him. Petition at 35. This is an erroneous assertion. In 1991, the Texas Legislature did not eliminate the language prohibiting the trial court or the parties from informing the jury of the consequences of the failure to agree on the special issues; it simply moved that language to the end of Article 37.071 § 2(a). H.B. 9, § 15,

72nd Leg., 2nd Sess. (Tex. 1991). Therefore, the "ban" is still in place.

Fifth, ShisInday claims that the facts of his case are distinguishable from *Jones* because the petitioner in *Jones* was unable to show that any confusion worked to his detriment, whereas a few jurors in ShisInday's case held out for several days. Petition at 36. Thus, he argues it is likely the jurors would have continued to hold out had they known of the consequences of a deadlock. *Id.* However, *Jones* did not hinge on the duration of juror deliberations; the Court simply stated that where the effect of an alleged instruction error is so uncertain, a defendant cannot show that his substantial rights were violated. *Jones*, 527 U.S. at 394-95. And because confusion over the consequences of a deadlock could lead a jury in either direction, it's potential effect is speculative. *Id.* Moreover, ShisInday's claim is premised on the faulty assumption that heated deliberations equates to confusion. But the punishment phase of his case lasted three days, eighteen witnesses were presented, 120 exhibits were introduced, and the jury was required to reconsider the evidence presented during guilt-innocence. Petition, Exhibit C at 25. The reasonable deduction is not that the jurors were confused, but that they had significant disagreements about the weight of the evidence. And despite those disagreements, they did make slow progress in reaching a verdict, which is why the trial court informed the jurors to continue deliberating and did not declare a hung jury. *Id.* at 25-37.

Last, ShisInday asks this Court to grant certiorari review in order to clarify those circumstances in which an instruction regarding a deadlock might be appropriate.

Petition at 36. But, as stated, *Jones* did not delve into this issue because that information has no relevance to the jury's role in sentencing and, thus, cannot mislead. *Jones*, 527 U.S. at 382. Either there are no such circumstances or they are so abstract that further consideration of the matter would be futile. Regardless, even if this Court did identify a scenario where a court should give an instruction about the consequences of a deadlock, (1) it would not be the instant case, and (2) ShisInday would be barred from relying on the new rule under *Teague v. Lane*.

Based on the foregoing, ShisInday's complaints about the Texas sentencing scheme are waived and meritless. Consequently, certiorari review is not warranted.

CONCLUSION

For the above reasons, the Director respectfully requests that ShisInday's petition for writ of certiorari be denied.

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(5)

No. 07-1383

IN THE SUPREME COURT OF THE UNITED STATES

SHOZDIJIJI SHISINDAY, a/k/a DANNY DEAN THOMAS,

Petitioner,

v.

NATHANIEL QUARTERMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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CAPITAL CASE

I.

THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE INTRODUCTION OF GILLIAM'S TESTIMONY WAS A *RIGGINS* VIOLATION, EXEMPT FROM HARMLESS-ERROR REVIEW

In *Riggins* v. *Nevada*, 504 U.S. 127 (1992), the Court held that a defendant who had been forcibly medicated with anti-psychotic drugs at trial was entitled to a new trial without having to prove actual prejudice, because—due to the nature of the error—such efforts would be "futile" and "purely speculative." *Id.* at 137. Petitioner submits that what the State did here, namely obtain testimony against Petitioner at a trial during which he was forcibly medicated without justification, and then use that evidence to convict him and sentence him to death, violates *Riggins*. Respondent argues that because this testimony was obtained in one trial, and then used in a second trial, its use was somehow no longer a *Riggins* violation, but rather a Confrontation Clause violation. The Court, Petitioner submits, should grant certiorari to resolve this issue.

Whether the introduction of the Gilliam testimony was a *Riggins* violation is relevant to whether the error that occurred in Petitioner's case is subject to harmless-error review. The Fifth Circuit, Petitioner submits, clearly erred when it "disagree[d]" with Petitioner's argument that one who "establishes a *Riggins* violation...need not prove prejudice or harm to obtain relief" and ruled that the harmless-error

standard in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), should apply. (App. A at A-16.)[1] Indeed, Respondent concedes that *Riggins* violations are not subject to harmless-error analysis. (*See* Resp't's Br. Opp'n at 12.) Consequently, Respondent labors to persuade the Court that Petitioner's case is distinguishable from *Riggins*.

Respondent first suggests that because the federal district court which granted Petitioner relief in 1997 also denied relief on his competency claim, that court necessarily found that the medication did not adversely affect him. Respondent's argument grossly misstates the actual facts. The record before the district court in 1997 amply supported its finding that the medication had adverse effects on Petitioner, and seriously impaired his ability to understand the proceedings and participate in his trial. (*See* Pet. at 8, 14; Apps. E, H ,I, J ,K, L, M.) The district court's findings are law of the case and no longer subject to review.

Respondent also attempts to recast Petitioner's claim as a claim that "the admission of [Gilliam's testimony] violated [Petitioner's] right to confrontation under *Riggins* because he was unable to adequately cross-examine Gilliam at his first trial due to his medicated state." (Resp't's Br. Opp'n at 1.) While Petitioner has Confrontation Clause rights that both underlie and exist independently of *Riggins*, and which are addressed separately in this brief, Petitioner does

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[1] All references to "App." are to the appendices to the Petition. References to "Supp. App." are to the appendices to this Reply brief.

not claim his rights under *Riggins* were infringed only because he was unable to adequately cross-examine Gilliam. Rather, Petitioner's claim is that he was entitled to be mentally present at his trial, and that because he was involuntarily medicated, he was denied the entire panoply of rights that underlie *Riggins*, including the right to be present at his trial, the right to consult with counsel, and the right to cross-examine witnesses. All of these rights were again violated when testimony obtained in violation of *Riggins* was used to convict and sentence him to death at his retrial.

Petitioner submits that Respondent fails to grasp the essence of *Riggins*—namely, that once a *Riggins* violation is found, any attempt to assess prejudice or harm from that violation is futile, because the effect of the medication on the defendant and his ability to participate in his trial cannot be assessed from a trial record. *Riggins* prescribes a one-step process—if the court finds that a defendant has been forcibly medicated without the requisite showings to justify the medication—the defendant is entitled to a new trial. There is no analysis of harm.

The Court made clear in *Riggins* that the unjustified forcible medication of defendant with anti-psychotic drugs during his trial can be cured only through a retrial. But when the State reads testimony obtained in violation of *Riggins* at that retrial, the remedy afforded in *Riggins* is completely undermined. The rulings of the lower courts in this case, and the positions articulated by Respondent in its Opposition Brief, evince a real need for the Court to clarify its ruling in *Riggins*, and in particular, to act to ensure that *Riggins* violations are appropriately remedied.

The Court should grant certiorari in this death penalty case to address this important issue.

II.

THIS COURT CAN AND SHOULD GRANT CERTIORARI TO DECIDE WHETHER AND HOW HARMLESS-ERROR ANALYSIS APPLIES TO CONFRONTATION CLAUSE VIOLATIONS

A. If the Admission of Gilliam's Testimony is Considered a Confrontation Clause Violation, the Court Can and Should Decide Whether Harmless-Error Analysis Applies to Such Violations.

Respondent offers several reasons why this Court should not grant review to consider Petitioner's arguments that Confrontation Clause violations like the one in this case should not be subject to harmless-error analysis. None of Respondent's arguments are persuasive.

First, the Court has jurisdiction to hear this claim. Petitioner properly "pressed" below the claim that the violation of his Confrontation Clause rights should not be subject to harmless-error analysis. *See U.S.* v. *Wells*, 519 U.S. 482, 488 (1997). In his federal habeas petition and brief before the Fifth Circuit, Petitioner argued that the introduction of Gilliam's testimony at his second trial violated his rights under the Confrontation Clause. (*See* Supp. App. A at A-1; Supp. App. B at B-5.) Petitioner

specifically argued before the Fifth Circuit that harmless-error analysis should not be used to assess the effect of the introduction of this testimony. (*See* Supp. App. B at B-34.) In fact, Respondent characterized this claim as a Confrontation Clause argument. (Resp't's Br. Opp'n COA at 30) ("ShisInday argues that the court below improperly applied a harmless-error analysis to reject his underlying Confrontation Clause claim").

Respondent argues that the Court has no jurisdiction to hear this issue because Petitioner did not cite *Crawford* v. *Washington*, 541 U.S. 36 (2004), in arguing that harmless-error analysis should not apply to the violation of his Confrontation Clause rights. While Petitioner did not cite *Crawford* below, his reliance on *Crawford* is not a new claim. It is merely "a new argument to support what has been his consistent claim." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). The introduction in a petition for certiorari of a new argument in support of a claim pressed below does not deprive this Court of jurisdiction. A petitioner is not "limited to the precise arguments [he] made below" when bringing an issue before this Court, *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992); and "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim." *Id.* Furthermore, jurisdiction is particularly appropriate where the "issue is ... 'in a state of evolving definition and uncertainty.'" *Va. Bankshares* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (quoting *St. Louis* v. *Praprotnick*, 485 U.S. 112, 120 (1988)).

Second, Respondent's argument that Petitioner has misread *Crawford* is wholly disingenuous. Petitioner does not argue that *Crawford* squarely addresses whether or not harmless-error review applies to Confrontation Clause violations. Rather, Petitioner argues that—in light of the Court's decisions in *Crawford* and recently in *Giles* v. *California*, 128 S. Ct. 2678 (2008), which elaborated on the Clause's original intent, significance and logic—the Court should revisit the issue of the appropriate standard of review for Confrontation Clause errors involving a deprivation of the right to cross-examination.

Third, Respondent argues that to the extent Petitioner makes arguments based on *Crawford*, his claim is barred by *Teague* v. *Lane*, 489 U.S. 288 (1989). Respondent raises *Teague* for the first time in its opposition to this Petition, and its *Teague* defense has thus been waived. *See, e.g.*, *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1046 (2008); *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990). This claim was pressed and passed on below and Respondent was on notice of it. Respondent failed to raise a *Teague* defense before the Fifth Circuit and should not be permitted to do so now.

Lastly, Respondent's fourth objection—that *Coy* v. *Iowa*, 487 U.S. 1012 (1988), has definitively decided the issue of the appropriate standard of review of Confrontation Clause violations—simply confirms why review is now appropriate. *Coy* was decided in 1988, long before the Court's decisions in *Crawford* and *Giles* that Petitioner submits change the landscape for the review of such claims, and which give rise to the need to address this issue. Furthermore, *Coy* did not

involve the right to cross-examination, which was violated in Petitioner's trial and on which the Confrontation Clause analysis in *Crawford* and *Giles* focused. Cross-examination, more than any other aspect of confrontation, involves an exchange in court whose outcome is unpredictable; thus, denial of the right to cross-examine should not be subject to harmless-error analysis.

B. *Fry* does not Resolve Confusion in the Lower Courts as to How to Apply *Fulminante's* Trial-error/Structural error Analysis to Confrontation Clause Cases.

Petitioner also argues that the Court should grant certiorari to resolve confusion in the lower courts regarding how *Arizona* v. *Fulminante's* trial-error/structural-error analysis applies to Confrontation Clause claims. 499 U.S. 279 (1991). Respondent suggests, with minimal analysis, that *Fry* v. *Pliler*, 127 S. Ct. 2321 (2007), resolved the confusion on this issue. *Fry* does not even reference the conflict that Petitioner points to, let alone resolve it. *Fry* decides only whether federal courts should apply the *Brecht* standard in cases when the state court did not apply the standard announced in *Chapman* v. *California*, 386 U.S. 18 (1967). *Fry* does not address how courts should apply the trial-error/structural-error framework in Confrontation Clause cases, or clarify the lower courts' confused application of *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986) and *Brecht*.

Moreover, Respondent's argument that *Teague* bars the Court from deciding this claim on its

merits is also incorrect. To the extent Petitioner seeks new law on this point, that law concerns only the appropriate standard of review in federal habeas proceedings and does not affect how state courts should decide constitutional claims raised on direct appeal. Therefore, *Teague* does not apply. *See Rodriguez* v. *Chandler*, 382 F.3d 670 (7th Cir. 2004).

This Court has not considered *Teague* relevant when articulating the appropriate standard of review of constitutional error on federal collateral review. In *O'Neal* v. *McAninch*, 513 U.S. 432 (1995), for example, the Court held, without addressing *Teague*, that when a federal judge in habeas proceedings is in grave doubt about whether a trial error involving constitutional law had a substantial and injurious effect on the jury's verdict, that error is not harmless. Indeed, the Seventh Circuit has explicitly recognized that *Teague* does not bar the application of new standards of review of constitutional error in federal habeas proceedings. *See Rodriguez*, 382 F.3d at 673 ("*Teague* controls the application on collateral review of new rules governing the conduct of police, prosecutors, or courts preceding the verdict and sentence—that is, the primary conduct under review in the collateral attack—but not the standards by which the federal court conducts its own review. We therefore decide whether the error was harmless using currently applicable federal rules."); *see also Rodriguez* v. *Chandler*, 492 F.3d 863, 865 (7th Cir. 2007).

In addition, Respondent has waived any *Teague* defense by not raising it in the Fifth Circuit. *See, e.g.*, *Danforth*, 128 S. Ct. at 1046; *Collins*, 497 U.S. at 41. Finally, to the extent Respondent's *Teague*

arguments are not waived and are in conflict with the authorities discussed above, they provide yet another reason for the Court to grant certiorari—to address the application of *Teague* to claims seeking the "refinement of harmless-error analysis for the federal judiciary," *Rodriguez*, 492 F.3d at 865.

C. Even if Harmless-Error Analysis Applies to the Improper Introduction of Gilliam's Testimony, There Was Significant Harm.

Gilliam's testimony was critically important in convincing the jury that Petitioner shot Ms. Harrison—the allegation that led to his conviction and sentence of death. Credible evidence introduced at trial suggested that Petitioner's confession—the only evidence suggesting Petitioner was the shooter—was both coerced and unreliable. 21 R.R. 20-22.[2] Because the reliability of the confession was at issue, the prosecution sought to present other evidence supposedly corroborating the confession.

Gilliam's testimony was the strongest piece of such corroborating evidence because it was *the only unbiased evidence* bearing on Petitioner's alleged ownership of the murder weapon. While Respondent contends that "[t]he gun...had already been identified as ShisInday's gun by Martha Tarver, Doyle Peels, and...Ronald McHenry," (Resp't's Br. Opp'n at 18), each of these witnesses was a family member or close friend of the Peels family. *See* 15 R.R. 24-26, 15 R.R. 88-89, 15

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[2] All such references are to the trial transcripts of Mr. ShisInday's 1998 re-trial.

R.R. 119-20. Without Gilliam's testimony to support the questionable confession, there was little in the case pointing to Petitioner as the shooter—a critical factor in the jury's likely assessment of guilt and punishment. There was a reason why the State chose to offer this evidence over Petitioner's objections, knowing that it raised, at the very minimum, significant appeal issues. It was because the State knew that it might not obtain a capital murder conviction and death sentence without this evidence.

III.

THIS COURT HAS JURISDICTION TO CONSIDER WHETHER ARTICLE 37.0711 OF THE TEXAS CODE OF CRIMINAL PROCEDURE ("TCCP") UNCONSTITUTIONALLY MISLEADS JURIES AND THIS CLAIM IS NOT TEAGUE BARRED

Respondent argues that the Court lacks jurisdiction to hear Petitioner's claim that a Texas statute had the effect of unconstitutionally misleading jurors in his case about their ability to effect a life sentence. Respondent's arguments ignore the fact that (1) the parties have fully understood that the constitutionality of TCCP Art. 37.0711 has been at issue in this case since the trial court rejected Petitioner's requested deadlock instruction on the basis of that provision, and (2) the issue of whether Petitioner was unconstitutionally denied a deadlock instruction was addressed by the Fifth Circuit.

During jury deliberations, the prosecution objected to Petitioner's requested deadlock instruction

stating, "I would object to that instruction being given pursuant to Art. 37.071., Sec. 2. I believe it is improper for the jury to be told the result of their hanging." (App. Q at Q-4.) The court immediately denied the requested instruction. *Id.* From that moment forward all parties clearly understood that the State's objection to the requested instruction and the court's denial of it were based on Art. 37.071's prohibition, and that Petitioner's subsequent appeals regarding the requested instruction challenged a refusal to provide an instruction based on the ban set forth in this statute.

Before the Fifth Circuit, Petitioner expressly argued that the trial court's refusal to instruct the jury that a deadlock would result in an automatic life sentence affirmatively misled the jury. (*See* Supp. App. B at B-2.) Petitioner argued that the refusal to give the deadlock instruction was a violation of due process, and also argued—by citing *Romano* v. *Oklahoma*, 512 U.S. 1 (1994) and in rebutting argument based on *Jones* v. *U.S.*, 527 U.S. 373 (1999)—that the trial court's failure to provide the deadlock instruction violated the Eighth Amendment. (*See* Supp. App. B at B-2.)

The Fifth Circuit expressly addressed this claim, holding—in response to Petitioner's complaint about the trial court's failure to instruct the jury that its inability to reach a verdict on the death penalty would result in the imposition of a life sentence—that *Jones* precluded granting a COA on the issue of whether an accused facing the death penalty is "entitled to an instruction as to the effect of a sentencing deadlock." (App. A at A-15.) The Fifth Circuit thus clearly passed on the claim that not

providing the requested instruction was a constitutional error.

Petitioner's arguments that the trial court's refusal to give the requested deadlock instruction was unconstitutional, and that the Texas law that barred the trial court from giving the requested instruction is unconstitutional are thus two intimately connected arguments in support of the same claim—that he was unconstitutionally denied an instruction on the consequences of a jury deadlock that was necessary to prevent his jury from being misled about its role. Petitioner has consistently raised this claim at every level of his state and federal appeals.

This Court has made it clear that a litigant seeking review of a claim properly raised in the lower courts possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below. *See Lebron*, 513 U.S. at 379. The Court has also held that a litigant can make different arguments in support of the same general claim. *See Yee*, 503 U.S. at 534-35. It is the Court's "traditional rule" that it "may address a question properly presented in a petition for certiorari if it was 'pressed [in] or passed on' by the Court of Appeals." *Wells*, 519 U.S. at 488 (quoting *U.S.* v. *Williams*, 504 U.S. 36, 42 (1992)). The essence of the constitutional claim Petitioner raises was both "pressed in" and "passed on" by the Fifth Circuit, and is properly before the Court now.

In its opposition brief, Respondent raises for the first time the argument that *Teague* bars

Petitioner's claim regarding the unconstitutionality of the trial court's refusal to instruct the jury about the consequences of a deadlock. Even if this claim could be said to seek a "new rule" (and it is not clear that it does), Respondent was on notice in the lower courts and waived any *Teague* defense by not raising it at that time. *See, e.g.*, *Danforth*, 128 S. Ct. at 1046; *Collins*, 497 U.S. at 41.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court issue the requested writ of certiorari.

Dated: July 23, 2008

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SUPPLEMENTAL APPENDICES

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Supplemental Appendix A

Excerpt from Federal Petition for Writ of Habeas Corpus filed in Southern District of Texas Dated March 1, 2006

(pp. 37-39)

TESTIMONY INTRODUCED AT HIS SECOND TRIAL VIOLATED SHISINDAY'S RIGHTS UNDER THE CONFRONTATION CLAUSE

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." This right, as the Supreme Court observed in *Crawford*,[13] can be traced back to common law, and was well known to the Framers. Commented the Court:

> [t]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.
>
> *Crawford*, 541 U.S. at 53-54.

Justice Scalia, writing for the majority, noted that with the holding of *Crawford*, the Court has abandoned the 'indicia of reliability' test promulgated in *Ohio v. Roberts*, 448 U.S. 56 (1980), in favor of the core right assured by the Confrontation Clause: the right to confront, and cross-examine, witnesses.

---

[13] *Crawford v. Washington*, 541 U.S. 36 (2004).

Crawford, 541 U.S. at 68-69. "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59.[14] u Thus, the holding of Crawford is simple: absent the opportunity for cross-examination, the prior testimony is barred.

In ShisInday's case, Judge Black ruled that the state prevented him from cross-examining witnesses at his first trial due to his forced medication. The trial court erred when it nevertheless admitted Gilliam's testimony from the first trial over defense objection.[15]

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[14] Notes Scalia wryly, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes. " 541 U.S. at 62.

[15] "First reason is this entire case was reversed on the Sixth Amendment issue based on the Riggins case concerning the defendant's lack of ability to cross-examine, effectively participate in the cross-examination and the confrontation of the witnesses in the case because he was drugged or on drugs during the time of his trial.

We think that the State's attempt now to introduce before the jury selection portions of that prior testimony for which the entire case was reversed because the defendant wasn't able to properly cross-examine the witnesses or participate in the cross-examination or confront the witnesses, could constitute error in this case and would be, in our estimation, reversible error." R.R. Vol. XVIII, p. 92, 112-15.

The State sought to introduce the testimony under Texas Rule of Evidence 804(a) (b) (1), the exception to the hearsay rule for prior testimony when the witness is unavailable due to death. It is disturbing to note that the trial court did not even bother to question the reliability of the testimony as outlined in *Roberts*, but summarily overruled the objection, admitting the testimony. This is precisely what *Crawford*, and the Confrontation Clause, forbids. As the Court pointed out, the Framers understood that "judges, like other government officers could not always be trusted to safeguard the rights of the people.... They were loath to leave too much discretion in judicial hands." *Crawford*, 541 U.S. at 67.

The Court's intent could not be clearer: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 541 U.S. at 68-69. ShisInday did not have the opportunity to confront witness Gilliam. For the trial court to admit the testimony was a violation of ShisInday's fundamental Constitutional rights and for this reason alone, his case must be reversed.

Supplemental Appendix B

Excerpts from Petitioner's Brief in Support of a Certificate of Appealability ("COA") filed in the Fifth Circuit Court of Appeals on July 12, 2007

(pp. 28-31)

ISSUE NUMBER THREE: A CERTIFICATE OF APPEALABILITY SHOULD BE ISSUED ON WHETHER THE STATE COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS BY INSTRUCTING THE JURY TO CONTINUE TO DELIBERATE AFTER REPEATEDLY RECEIVING JURY NOTES INDICATING THE JURY WAS HUNG WITHOUT INFORMING THE JURY OF THE OUTCOME OF A HUNG JURY.

There were six hours of punishment testimony. The record shows that the jury was out for three days deliberating Petitioner's punishment, and for the last two days, continually sent out notes to the court detailing how the jurors were dead locked and that certain jurors were not budging. The court continued to instruct the jury to deliberate. A note by defense counsel in the record indicated he could hear the deliberations were becoming noticeably acrimonious from inside the courtroom. One note indicated that one of the hold out "would not change their mind for all of eternity." The jury charge instructed the jury that 10 votes were necessary for life sentence. However, the jurors were not informed that under the law, if they could not reach an agreement, the verdict would be life. The trial court's instruction, in light of circumstances and the law, was a coerced death sentence.

Petitioner argued before the district court and repeatedly in the State court that the trial court should have either accepted a hung jury verdict or

informed the jury that if they could not agree, the court would grant a mistrial and defendant would receive life sentence. Petitioner had filed a written request with the trial court to instruct the jury the outcome of a hung jury. (RR XXVI at 6). There were two hold-outs in the jury who probably found it hopeless to maintain their convictions because the jury instructions told them they needed 10 jurors for a life sentence.

Due process requires that a jury considering whether to impose death sentence must be provided accurate information that does not create confusion. *See Simmons v. South Carolina*, 512 U.S. 154 (1994) (jurors should not be allowed to speculate as to whether a defendant could be eligible for parole if he received a life sentence); *Romano v. Oklahoma*, 512 U.S. 1 (1994) (a jury cannot be affirmatively misled regarding its role in the sentencing process.). While it is true, the Supreme Court has held a jury does not have to be informed that if it cannot reach a unanimous verdict during a federal death sentencing, there will be a retrial, see *Jones v. United States*, 527 U.S. 373 (1999); that scenario is not misleading because the jury instructions did not misinform the jury of the law.

However, the jury in Petitioner's case was instructed, that 10 votes were required for a life sentence when in reality, only one is necessary because under Texas law, a hung jury is a life sentence. Unlike *Jones*, Petitioner is able to show that confusion *did* work to his detriment by the fact that the holdouts indicated they were confused by the instructions and would not have changed their votes had they known it made a difference.[3]

The misinformation, in combination with the instructions to continue deliberations and then the unanswered notes, all cumulate in a due process violation. Under *Lowenfield v. Phelps*, 484 U.S. 231, 237-39, (1988) a reviewing court must consider the propriety of the supplemental jury charge "in its context and under all the circumstances." Numerous cases support the position that the court's repeated instructions to deliberate and refusal to accept a hung verdict and grant the mistrial was unconstitutional. While in *Coleman v. Quarterman*, 456 F.3d 537 (5th Cir. 2006), this Court held the trial court's instruction were appropriate words of encouragement, the record establishes that the deliberations and notes from the jury in Petitioner's case differ from *Coleman*.

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[3] Even assuming the jurors' affidavits are not admissible evidence, the record indicates there was coercion. The juror indicated he would "hold out to all eternity", the record ntoes "acrimonious deliberations" just prior to the verdict, and it is not a stretch to glean from the length of the deliberations and the instructions to continue deliberating that the jurors who changed their mind felt they had no choice.

Most notably, the trial court in Petitioner's case sent out two plain notes ordering the jury to continue deliberating and the jury continues to reply that at least one individual refuses to change his mind until all of eternity. The next two notes by the jurors go *completely unanswered* for approximately a full day; then comes the verdict. The court's failure to respond to the jury and their notes sent the message that the jury must reach a conclusion, which has been held to be coercive and unconstitutional. *See Jenkins v. United States*, 380 U.S. 445 (1965); *United States v. Duke*, 492 F.2d 693 (5th Cir. 1974). While it is true that *Duke* and *Jenkins* do not involve habeas cases, the principle of coercion is not entirely inapplicable to habeas. Because the federal standard examines the totality of the circumstances, the cases cited below are not sufficient to establish that the State court followed federal law in Petitioner's case.

The court's numerous instructions to continue deliberating, in the light of the fact that the jury mistakenly believed that 10 jurors were needed for a life sentence, caused confusion and rendered a verdict based upon misinformation in Petitioner's trial. Ultimately, the Petitioner's sentence was not the true verdict rendered by the jury, but a coerced and unconstitutional, not unanimous death verdict. Reasonable jurist would differ whether the forced continued deliberation violate Due Process.

(pp. 32-35)

ISSUE NUMBER FOUR: A CERTIFICATE OF APPEALABILITY SHOULD BE ISSUED ON WHETHER THE STATE COURT ERRONEOUSLY REQUIRED THAT PETITIONER ESTABLISH HARM FROM THE TRIAL COURT'S ERROR IN INTRODUCING PRIOR TESTIMONY FROM THE FIRST TRIAL THAT THE FEDERAL COURT RULED WAS A RIGGINS VIOLATION AND ERRONEOUSLY HELD THERE WAS NO HARM.

A federal court reversed Petitioner's first trial for a *Riggins* violation finding he was unjustifiably forcibly medicated and that it violated his Due Process rights. Petitioner argues that the trial court violated *Riggins* and the confrontation clause by admitting testimony from the first trial at the second trial of Mr. Gilliam that Petitioner purchased the alleged murder weapon from him. The State court held that the testimony was cumulative and thus not a violation to the right of Confrontation. The federal court ruled that even if the admission of the prior testimony from Petitioner's first trial violated the Confrontation Clause, that the error did not have a substantial and injurious effect or influence in determining the jury's verdict. In effect, the district court erroneously required Petitioner to show harm from the *Riggins* violation.

In *Riggins v. Nevada*, 504 U.S. 127 (1992), the Supreme Court held that it was error to

order that the defendant be administered antipsychotic drugs during the course of his trial over his objections without findings that there were no less intrusive alternatives, that the medication was medically appropriate and that it was essential for the sake of the defendant's safety or the safety of others. The Court further found that the defendant did not have to prove harm to obtain relief. The Court explained as follows:

> Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril. ...
>
> Like the consequences of compelling a defendant to wear prison clothing, [citation omitted] the precise consequences of forcing antipsychotic medications upon Riggins cannot be shown form a trial transcript.

Riggins, 504 U.S. at 137.

Petitioner's first federal habeas court followed *Riggins* in reversing the first trial. The Court specifically found that "the pleadings [of habeas counsel] were replete with affidavits testifying to the adverse effect of the medication on petitioner's demeanor at trial." Next, the court found it "would be futile and purely speculative" to try to assess the impact of the medication on petitioner.

Riggins never conducted a harm analysis. Logic dictates that under the circumstances of this case, it would be difficult to establish specific harm. Mr. Gilliam was deceased at the time of the second trial. Accordingly, just as the Court in *Riggins* stated, any effort to prove prejudice from the introduction of Mr. Gilliam's testimony would be purely speculative because there is now manner in which to establish that Mr. Gilliam testimony could be impeached without him.

Since *Riggins*, the Supreme Court has not addressed the appropriate standard for review for such error. It would stand to reason though Riggins involves structural error of the type that defies harm analysis.

Recently, the Court held in *Fry v. Fitter*, 551 U.S. ____, 127 S.Ct. 2321 (2007) that, on collateral review by federal habeas court of criminal judgment of state court, federal court assesses prejudicial impact of state court's constitutional error under *Brecht v. Abrahamson*, 507 U.S. 619 (1993) "substantial and injurious effect" standard. The Court also did clarify there is room for an exception in an unusual case where there is deliberate and egregious error of the trial type, or one that infects the integrity of the proceeding. *Fry*, citing *Bretch*.

This error in introducing testimony from an invalid hearing was deliberate and egregious. After overmedicating Petitioner and making him sit through trial unconscious, and then, 17 years later, to introduce testimony from those proceedings without any way to refute it, is egregious. The proceeding's integrity is tainted with the blatant disregard of federal law's due process requirement. To hold any less would invalidate

the holding of *Riggins* and allow the State to circumvent federal law through the subsequent retrial.[4]

In sum, reasonable minds could differ on whether Petitioner must prove harm from this Riggins violation and there is sufficient cause for reasonable minds to differ whether there was actual harm from Mr. Gilliam's testimony.

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[4] Reasonable minds could agree that if a harm analysis is required, there was prejudice from the testimony of Mr. Gilliam. Mr. Gilliam presented only forensic testimony that linked Petitioner to the murder weapon. However, former defense counsel had only asked one question on cross examination, while Petitioner was forcibly medicated and falling at counsel table. Mr. Gilliam's testimony was hardly cumulative of the other testimony that Petitioner had the gun earlier in the day. The two witnesses that testified Petitioner had the gun earlier that evening were not as prejudicial as the uncontested testimony that Petitioner purchased the gun several weeks prior. Finally, the harm was exacerbated with evidence of blood scraping found on the gun that came from the victim that the Court of Criminal Appeals ruled was erroneously admitted.

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No. 07-1383

IN THE SUPREME COURT OF THE UNITED STATES

SHOZDIJIJI SHISINDAY, a/k/a DANNY DEAN THOMAS,
Petitioner,
v.
NATHANIEL QUARTERMAN
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF FORENSIC PSYCHIATRISTS DR. DAVID LOWENTHAL, DR. JEREMY BUTLER AND DR. RICHARD DUDLEY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

This brief is filed on behalf of forensic psychiatrists Dr. David Lowenthal, Assistant Clinical Professor of Psychiatry, Columbia University and Director, Washington Heights Community Service Inpatient Unit, New York State Psychiatric Institute; Dr. Jeremy Butler, Assistant Clinical Professor of Psychiatry, Columbia University, and Attending Psychiatrist at Mid-Hudson Forensic Psychiatric Center; and Dr. Richard Dudley, a psychiatrist in private practice and previously an Adjunct Associate Professor of Law at the New York University School of Law, who has testified as an expert in psychiatry in numerous criminal cases, including capital cases, throughout the country.[1] The signers have substantial expertise on the uses and effects of antipsychotic medication.

The recent decision of the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit"), in the matter of *ShisInday v. Quarterman*, 511 F.3d 514 (5th Cir. 2007), creates an exception to the rule that this Court announced in *Riggins v. Nevada*, 504 U.S. 127 (1992), by allowing the state to reuse transcript testimony from a previous trial where the defendant was unlawfully medicated in violation of *Riggins*. The *Riggins* rule defines the process by

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief from both parties have been filed with the Clerk of the Court.

which a court determines whether to allow the state to forcibly medicate a criminal defendant with antipsychotic medication in order to render him competent to stand trial. Forensic psychiatrics play a central role in this process by, among other things: (1) informing the court about the mental state of mentally ill defendants, (2) prescribing appropriate treatments for such defendants, and (3) explaining how those treatments, including medications, are likely to affect such defendants. As forensic psychiatrists, we have a special interest in this matter both because of the central role forensic psychiatry plays in hearings required by *Riggins* and because the *Riggins* rule protects the constitutional rights of our patients.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has declared that "an individual has a constitutionally protected liberty 'interest in avoiding involuntary administration of antipsychotic drugs' -- an interest that only an 'essential' or 'overriding' state interest might overcome." *Sell v. United States*, 539 U.S. 166, 178-79 (2003) (quoting *Riggins*, 504 U.S. at 134-35). The *Riggins* rule is designed to protect the constitutionality and integrity of the process by which courts determine whether a state may forcibly medicate a criminal defendant with antipsychotic medication in order to render him competent to stand trial. *Id.* This Court has instructed that when a state seeks to medicate a criminal defendant against his will, it must make specific showings of necessity and medical appropriateness. *Id.* at 180. That determination

requires that the court consult with psychiatrists regarding the state of defendant's mental health, whether forcible medication may help accomplish the state's objective, the appropriate medication and dose, and the possible side effects that the defendant may suffer if medicated. *Id.* at 180-81.

Petitioner's initial conviction and death sentence were vacated by a federal district court, which held that the trial court had allowed the state to forcibly medicate Petitioner without taking the required measures to determine whether such medication was necessary or appropriate. *Thomas v. Johnson*, Civ. No. H-95-5236 (S.D. Tex. July 2, 1997) (Black J.). In Petitioner's second trial, the trial court allowed the state to admit, over the defense's objection, into evidence testimony from Petitioner's first trial, despite the holding of the federal district court that this testimony had been tainted by a *Riggins* violation. *ShisInday*, 511 F.3d at 523. Applying a "harmless error" analysis, the Fifth Circuit denied Petitioner's application for a Certificate of Appealability on this issue. *Id.* at 524.

In *Riggins*, this Court instructed that a defendant who is forcibly medicated without the required findings of necessity and appropriateness need not show harm to be entitled to a new trial. *Riggins*, 504 U.S. at 137. This holding reflects the Court's recognition that it is impossible to measure the harm that inappropriate medication can have on a defendant's trial. *Id.* In addition, the fact that a defendant does not need to show harm provides the state with a strong incentive to comply with *Riggins*' requirements. The deterrent power and effectiveness of the *Riggins* rule, however, will be significantly

diminished if trial courts allow states to admit at subsequent trials – ordered because of a *Riggins* violation – evidence that the state elicited in violation of *Riggins*.

By granting certiorari to the petition at issue, the Court can provide appellate courts with a standard by which to review trial courts' decisions to admit *Riggins*-tainted evidence. A standard that provides that such grave constitutional violations are never tolerated, or tolerated only in very limited and specific circumstances, will help preserve the integrity and effectiveness of the *Riggins* rule.

ARGUMENT

We do not, in this brief, take a stand on whether the Court should ultimately hold for or against Petitioner, if certiorari is granted. The sole purpose of this brief is to encourage the Court to grant the petition at issue so that the Court can announce a standard of review that will protect the important rule that it announced in *Riggins*.

A. Use and Effect of Antipsychotic Medication

As long recognized by this Court, antipsychotic medication plays a critical, often indispensable, role in treating criminal defendants who, due to mental illness, are dangerous to themselves or others. *See Washington v. Harper*, 494 U.S. 210 (1990). Antipsychotic medication also plays a central role in restoring or maintaining the competence of mentally

ill defendants so they can stand trial. *See Sell*, 539 U.S. 166.

But "[w]hile the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects." *Riggins*, 504 U.S. at 134. Common side effects such as sedation or over-sedation (which can cause a person to be sluggish or induce sleep) and tardive dyskinesia,[2] may "interfere with the defendant's ability to receive a fair trial." *Sell*, 539 U.S. at 179 (noting Justice Kennedy concurring opinion in *Riggins*).

Since this Court decided *Riggins*, new types of antipsychotic medications have been introduced that may have fewer acute side effects than the drugs used when *Riggins* was decided. *See United States v. Gomes*, 289 F.3d 71, 83 (2d Cir. 2002); *States v. Weston*, 255 F.3d 873, 877 n.3 (D.C. Cir. 2001). Nevertheless, the older medications are still widely used. J. Parks, *et al., Principles of antipsychotic prescribing for policy makers, circa 2008. Translating knowledge to promote individualized treatment*, Schizophrenia Bul. 2008.[3] Moreover, the risk of

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[2] "Tardive dyskinesia is a neurological disorder, irreversible in some cases, that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face." *Riggins*, 504 U.S. at 134.

[3] *See also L. Shi, et al., Characteristics and Use Patterns of Patients Taking First-Generation Depot Antipsychotics or Oral Antipsychotics for Schizophrenia*, Psychiatric Service 58:482-488, Apr. 2007. This is especially true in prisons and jails, where cost considerations typically lead to a greater use of first-generation medication. *See* B. Veysey, *et al., Costs, Control or Just Good Clinical*

undesirable side effects, which may compromise a defendant's right to a fair trial, is still considerable, whether an individual is medicated using one of the new antipsychotic medications or one of the older ones. *See Developments in the Law -- The Law of Mental Illness*, 121 Harv. L. Rev. 1121, 1132 (2008); *Schizophrenia*, U.S. Dept. of Health and Human Services, Nat'l Inst. Mental Health, NIH Pub. No. 06-3517, p. 10 (Revised Jan. 2007).[4] This is especially true given the wide variation in clinical responses to the array of available antipsychotic medications, both in terms of the specific medication and the prescribed dose. *Id.* In other words, while one individual may have a therapeutic response to a relatively high dose of one medication, another individual may have an adverse response to a relatively low dose of the same medication.

B. The Right to Refuse Antipsychotic Medication

This Court has declared that a criminal defendant "has a constitutionally protected liberty

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Practice? The Use of Antipsychotic Medications and Formulary Decision-Making in Large U.S. Prisons and Jails, J. of Offendor Rehabilitation, Vol. 45, No. 1-2, pp. 189-206(18), Jan. 2008.

[4] *See also* R. Keefe, *et al.*, *Neurocognitive Effects of Antipsychotic Medications in Patients with Chronic Schizophrenia in the CATIE Trial.* Arch. Gen. Psychiatry 64(6):633-47, Jun. 2006; J. Ananth, S. Parameswaran, S. Gunatilake, *Side Effects of Atypical Antipsychotic Drugs*, Current Pharmaceutical Design, Volume 10, No. 18, pp. 2219-2229, Jul. 2004.

interest in avoiding involuntary administration of antipsychotic drugs." *Sell*, 539 U.S. at 178-79 (quoting *Riggins*, 504 U.S. at 134-35). This right protects the defendant's legitimate desire to avoid the risk of the potentially debilitating side effects, caused by antipsychotic medication, which could "interfere with the defendant's ability to receive a fair trial." *Id.* at 179. For example, an over-sedated defendant, who is continually nodding off and fighting just to stay awake, would have a great deal of difficulty following the proceedings, providing assistance to his counsel, and responding to potentially damaging testimony by prosecution witnesses. This right also protects the privacy and liberty of the defendant's body, as "the forcible injection of medication into a nonconsenting person's body [ ] represents a substantial interference with that person's liberty." *Riggins*, 504 U.S. at 134 (quoting *Harper*, 494 U.S. at 229).

The constitutional right of a criminal defendant to resist antipsychotic medication is not without limits. There are circumstances in which involuntary medication is permissible and appropriate. For example, forcible medication is appropriate where the state demonstrates "by a medical finding" that a person in custody has a mental disorder which is likely to cause harm to himself or others, unless medicated with the proper dose of antipsychotic medication. *Sell*, 539 U.S. at 178 (quoting *Harper*, 494 U.S. at 221-22). Involuntarily medication is also warranted when it is the only means by which "a mentally ill defendant facing serious criminal charges" can be rendered competent to stand trial. *Id.* at 179.

C. The *Riggins* Rule

The rule that this Court announced in *Riggins* is designed to ensure that a defendant's "constitutionally protected liberty interest in avoiding involuntary administration of antipsychotic drugs" will only be compromised if forcible medication is medically appropriate and is necessary to further an overriding state interest. *Sell*, 539 U.S. at 178-79. In *Sell*, the most recent decision by this Court to address a *Riggins* issue, this Court reaffirmed that the Constitution permits a state to involuntary medicate "a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial." *Id.* at 179. However, in order to do so the state must demonstrate that "the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." *Id.*[5]

A defendant who suffered a *Riggins* violation does not need to show harm to be entitled to a new trial. *Riggins* at 137. The *Riggins* court explained that:

> Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had

[5] A lesser standard applies where the state's goal is to contain or control a violent person in its custody. *Sell*, 539 U.S. at 181-82.

> been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given [the antipsychotic medication] Mellaril.

Id.

D. The Circumstances of the Case at Issue

Petitioner is a death-row inmate from Texas with a long and unfortunate history of mental illness. *ShisInday*, 511 F.3d at 517, 519. During his first capital murder trial, in 1982, Petitioner was treated with Prolixin Decanoate,[6] a "highly potent behavior modifier with a markedly extended duration of effect." *Harper*, 494 U.S at 257. Prolixin is a very effective drug when administered properly and is still in use today.[7] Petitioner argues that, as a result of the medication, he suffered from over-sedation. Petition for Writ of Certiorari at 7-8. Sedation is one of the more common side effects of Prolixin and certain other antipsychotic drugs. *See* Arana G. *An Overview of Side Effects Caused by Typical Antipsychotics*, J. of Clinical Psychiatry, 61 Supp.

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[6] *See* Appendix H to the Petition for Writ of Certiorari.

[7] *See* L. Shi, *et al., Characteristics and Use Patterns of Patients Taking First-Generation Depot Antipsychotics or Oral Antipsychotics for Schizophrenia*, Psychiatric Service 58:482-488, Apr. 2007.

8:5-11, 2000.[8] Over-sedation can be a side-effect or the result of improper administration of the medication.

In 1997, U.S. District Judge Norman Black of the Southern District of Texas vacated Petitioner's conviction and death sentence. *Thomas*, Civ. No. H-95-5236. He held that the trial court had erred when it allowed the state to forcibly medicate Petitioner without taking measures to determine whether the forcible medication prescribed was medically appropriate, necessary to accomplish an important state objective, and whether such objective could have been accomplished via less intrusive means. *Id.*

Petitioner was retried in 1998. *ShisInday*, 511 F.3d at 519. During his second trial, the court allowed, over the defense's objection, the state to admit into evidence testimony from Petitioner's first trial, despite the holding of the federal district court that Petitioner's first trial, including this testimony, was tainted by a *Riggins* violation. *Id.* at 523. At the end of the second trial, Petitioner was again convicted of capital murder and sentenced to death. *Id.* at 519-20.

Petitioner then filed a habeas petition with the federal district court on various grounds, including the admission of the *Riggins*-tainted evidence into the record. (Petitioner's application for federal habeas corpus was not heard by the judge who had vacated his original conviction on *Riggins* grounds as Judge Black had passed away.) Petitioner's application for

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[8] *See also Adverse Effects of the Atypical Antipsychotics*, J. of Clinical Psychiatry, 59 Supp. 12:17-22, 1998.

habeas corpus arising from his second trial was rejected in its entirety by the federal district court, which held that the admission of the *Riggins*-tainted evidence was "harmless error." *ShisInday v. Quarterman*, Civ. No. H-06-814, 2007 U.S. Dist. LEXIS 17099, at *53-56 (S.D. Tex., Mar. 9, 2007). However, this Court held that the supposed harmlessness of the error does not excuse a *Riggins* violation in a capital case. *See supra*, p. 7. The Fifth Circuit denied Petitioner's request for a Certificate of Applicability, adopting the holding of the district court in whole. *Id.* at 524.

E. The Need for a Standard Regarding Admissibility of *Riggins*-Tainted Evidence

The Fifth Circuit's decision in this case is troubling because it indicates that a state may be able to circumvent the purpose of the *Riggins* rule by introducing evidence elicited by a *Riggins* violation in a subsequent trial. In addition, the manner by which the state and reviewing courts handled the admission of the *Riggins*-tainted evidence suggests a lack of respect for the purpose and requirements of the rule this Court announced in *Riggins*.

Even after Petitioner's conviction was vacated because of a *Riggins* violation, the state sought to admit *Riggins*-tainted evidence into the record. In direct contravention of the federal district court's ruling, the trial court summarily permitted the admission of this evidence. In its review, the Fifth Circuit did not even address the fact that the constitutional error committed by the trial court was

the precise error, involving the exact same *Riggins* violation, which necessitated a second trial.

This Court has yet to declare the standard by which an appellate court should review trial errors concerning the admission of *Riggins*-tainted evidence. As psychiatrists, it is not our place to suggest to the Court the proper standard of judicial review. However, because the *Riggins* rule is critical to the field in which we practice and to the rights of the patients we treat, we have an interest that the standard that this Court chooses be a rigorous one that mandates compliance with the requirements of *Riggins*.

CONCLUSION

For the reasons described above, the petition for a writ of certiorari should be granted.

Dated: June 6, 2008

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In The Supreme Court of the United States

SHOZDIJIJI SHISINDAY, a/k/a DANNY DEAN THOMAS,

Petitioner,

v.

NATHANIEL QUARTERMAN

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JURORS FOR JUSTICE AMICUS BRIEF IN SUPPORT OF SHOZDIJIJI SHISINDAY'S PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Jurors for Justice is a national grassroots organization comprised of citizens who have been through the gut-wrenching experience of voting to sentence a defendant to death only to subsequently learn either that the defendants they convicted were innocent and exonerated based on information not presented during trial, or learn that they were provided incomplete and/or misleading information during the sentencing proceedings.[1]

Jurors for Justice believes jurors have the enforceable right to be fully informed during sentencing proceedings and the right never to be misled during sentencing proceedings when jurors literally are called upon to "play God" and decide whether a fellow human being should be put to death. The members of *Jurors for Justice* wish to inform reviewing courts of their unique perspective that when ordinary men and women serve on capital juries, their decisions weigh heavily, and their lives are forever changed by the knowledge that they were misinformed or misled when they voted to sentence a fellow human being to death.

SUMMARY OF ARGUMENT

This Court should grant *Certiorari* and hear Mr. ShisInday's appeal because it will provide a

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made any monetary contribution toward the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk pursuant to Rule 37.3.

unique opportunity to examine an unconstitutional Texas statute which violates jurors' rights by affirmatively misleading them into voting for death. Sociological research and empirical studies demonstrate capital jurors are under tremendous amounts of stress throughout service and oftentimes develop varying levels of physical or mental impairment. Studies and research also demonstrate jurors have a "tilt toward" death in their interpretation of jury instructions. The risk for an arbitrary sentencing verdict is dangerously high under TCCP Article 37.0711 because it misleads these impaired jurors into believing ten votes are required for life when in fact only one vote is necessary. By the time the jury is called upon for sentencing deliberation, their respective physical or mental impairments are likely at a peak thus explaining why holdout jurors, such as the three holdouts in Mr. ShisInday's case, eventually succumb to the death vote.

TCCP Article 37.0711 affirmatively misleads jurors about their role in sentencing by clouding their right to be informed with silence concerning the consequences of a deadlock. Numerous Supreme Court cases guarantee various rights to jurors which are categorically ignored by the statutory scheme at work in Texas; a scheme that basically requires jurors to be lawyers and analytically conceive what the deadlock consequences would be. By examining this scheme, this Court can save lives and preserve jurors' collective rights to be informed and never misled in the sentencing process.

ARGUMENT

This Court should grant *Certiorari* and hear Mr. ShisInday's appeal about how an unconstitutionally misinformed Texas jury was hopelessly forced by statute to vote for his death on a Sunday. Capital Jurors in Texas are systematically and unconstitutionally misinformed to tilt their sentencing decisions towards death. "They are for the most part highly dedicated, well-meaning people who work extremely hard...to do the moral dirtywork of a system that is not even honest enough with them to insist they have the full story..." Craig Haney, Ph.D., *The Capital Jury Project: Taking Capital Jurors Seriously*, 70 Ind. L.J. 1223, 1232 (1995).

I. Members of Capital Juries Have Rights From Summons to Verdict

America's enduring criminal jury system is one of its most cherished institutions. "I would rather trust my life, liberty and property to a verdict of twelve of my honest neighbours, than to the opinion of any great man in the world, for great men are not always honest men." *Letters From A Countryman*, reprinted in 6 THE COMPLETE ANTI-FEDERALIST 69, 73 (Herbert J. Storing ed., 1981). The criminal jury is distinguished as "the only guarantee to appear in both the original text of the Constitution and the Bill of Rights." Kenneth Klein, *Unpacking the Jury Box*, 47 Hastings L.J. 1325, 1337 (1996). As participants in this glorious tradition, ordinary folk summoned for jury duty are guaranteed certain rights. *See e.g.*, *Press Enterprise*

Co. v. Superior Court of California, 464 U.S. 501 (1984) (right against disclosure of private information); *Batson v. Kentucky*, 476 U.S. 79 (1986) (right to nondiscrimination in the jury selection process).

Once selected for criminal jury duty, the juror succeeds to even more rights. For example, jurors cannot be "affirmatively misled regarding [their] role in the sentencing process," *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994), nor can jurors be misled in a fashion which "diminishe[s] the jury's sense of responsibility." *Caldwell v. Mississippi*, 472 U.S. 320, 342 (1985) (O'Connor, J. concurring). *See also Jones v. U.S.*, 527 U.S. 373, 381-82 (1999) ("the District Court's failure to instruct the jury as to the consequences of a deadlock could give rise to an Eighth Amendment problem" if the jury was "affirmatively misled regarding its role in the sentencing process").

II. The Juror's Right to Information

In *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court acknowledged that jurors have "little, if any, previous experience in sentencing . . . [and] are unlikely to be skilled in dealing with the information they are given." *Id.* at 192. Because jurors are not skilled at making life-and-death decisions, this Court stated "[w]e think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Id.* at 204. This "guidance requirement" established in *Gregg* is a right which inures to all jurors and is a right that is

ignored when jurors are misled regarding their role in the sentencing process.

Because "jury duty is both a civic responsibility and an obligation of all qualified citizens," *The ABA Principles for Juries and Jury* Trials, 11 (2004), it is repugnant to our national conscience that jurors would be misled regarding their role in sentencing a man to death. That jury members deserve not only "*Gregg* guidance" but accurate information to fulfill their shared civic responsibility was recognized by this Court in *California v. Ramos*, 463 U.S. 992 (1983). In *Ramos*, this Court upheld a state law requiring judges to inform the jury that the governor may commute a life sentence to a sentence that includes the possibility of parole. *Id.* at 1013. This Court reasoned that "informing the jury of the Governor's power to commute a sentence of life without [the] possibility of parole was merely an accurate statement of a potential sentencing alternative." *Id.* at 1009. Pursuant to *Ramos*, jurors thus are guaranteed accurate information concerning sentencing alternatives. However, in this case Mr. ShisInday's jurors were deprived of their rights under *Gregg* and *Ramos*, and as a result Mr. ShisInday is scheduled to die in Texas.

III. Juror Rights Should Increase as the Juror's Mind and Body Deteriorates Through Service

The rights granted capital jurors under *Gregg* and *Ramos* are absolutely vital because jurors are frequently injured in body and mind during both the

criminal trial itself and the sentencing proceedings. "A number of researchers have reported that jurors feel stress at every stage of jury duty." Miller & Bornstein, *Juror Stress: Causes and Interventions*, 30 T. Marshall L. Rev. 237, 239 (2004). It is not unheard of for jurors to be excused for health problems caused by serving on a capital jury. *See People v. Torres*, 2002 WL 187175 (Cal. App. 2 Dist. Feb. 6, 2002) (no error in removing pregnant juror for stress stemming from conflicts during deliberation). Capital murder trials visit additional mental and physical burdens upon the jury than simply stress.

According to a study by the National Center for State Courts, 44% of jurors suffer anxiety when faced with the guilt/innocence choice during sentencing proceedings. National Center for the State Courts, *Through the Eyes of a Juror: A Manual for Addressing Juror Stress*, available at http://www.ncsconline.org/WC/Publications/Res_Juries_JurorStressIndexPub.pdf (Mar. 12, 2002). Furthermore, in a University of Cincinnati College of Medicine study, researchers analyzed four juries (including 2 murder trials) and found gastrointestinal distress (10 jurors); generalized nervousness (4 jurors); heart palpitation (6 jurors); headaches (4 jurors); sexual inhibitions (4 jurors); depression (4 jurors); anorexia (4 jurors); faintness (2 jurors); and numbness, lump in throat, chest pain, hives, and flu (1 juror each). Kaplan & Winget, *The Occupational Hazards of Jury* Duty, 20 Bull. Am. Acad. Psychiatry Law 325-33 (1992). Another well-known study concluded, "[i]t is clear that jurors are at an increased risk of suffering from depression

resulting from their participation in traumatic trials. It is also clear that the judicial system has a responsibility for the harm it causes jurors." Daniel Shuman, *The Health Effects of Jury Service*, 18 Law & Psychol. 267, 302 (1994).

Based upon the aforementioned studies, jurors in a criminal case are in a progressively worsening state of mental and physical impairment during trial and sentencing. This makes it all the more vital that these jurors receive increased guidance and access to accurate information about sentencing and its alternatives. Application of these studies to this case demonstrates Mr. ShisInday's jurors were in desperate need of the accurate legal point that only the vote of a lone juror was necessary for a life sentence, but Texas law unconstitutionally prevents that information from being given.

According to a study of Indiana jurors by Professor Joseph Hoffman, "after the trial was over, many jurors suffered lingering traumatic effects from their experience." Hoffman, *Where's the Buck? – Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137, 1156 (1995). The members of *Jurors for Justice* are intimately familiar with these lingering traumatic effects and humbly seek this Court's intervention to vindicate not only the rights of Mr. ShisInday and the misled jurors in his case, but also to protect the rights of those capital jurors who will receive a capital jury summons from the State of Texas in the future.

IV. Mr. ShisInday's Case Provides this Court a Chance to Reconsider its *Certiorari* Denial in *Brown v. Texas*

"How capital jurors should make the life or death sentencing decision is a critical issue at the core of modern capital jurisprudence." Bowers & Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605, 608 (1999) (hereinafter, "*Death By Default*"). Mr. ShisInday's case is from Texas, and four members of this Court voted to consider the Texas capital jury's role in sentencing in *Brown v. Texas*, 522 U.S. 940 (1997) (opinion of Stevens, J. on denial of *Certiorari*). In *Brown*, Justice Stevens stated, "[t]he situation in Texas is especially troubling." *Id.* at 942. Through an example analogous here because of its shared result, Justice Stevens added,

> [i]n...noncapital cases, Texas law requires that the jury be given an instruction explaining when the defendant will become eligible for parole. Thus, the Texas Legislature has recognized that, without such an instruction, Texas jurors may not fully understand the range of sentencing options available to them. Perversely, however, in capital cases, Texas law *prohibits* the judge from letting the jury know when the defendant will become eligible for parole if he is not sentenced to death. The Texas rule unquestionably tips the scales in favor

> of a death sentence that a fully informed jury might not impose."

Id. at 942 (emphasis in original).

While Mr. ShisInday's case does not involve informing the capital jury about the possibility of parole, it does involve a statutory prohibition that affirmatively misinforms the jury of sentencing options, which in turn has the effect of predisposing the jury to impose the death penalty. "[T]here is great similarity between the issue of jury instructions regarding the death sentence alternative, as addressed...in *Brown*, and the issue of jury instructions regarding the consequences of deadlock," as is presented by Mr. ShisInday's case. Laurie Berberich, *Jury Instructions Regarding the Deadlock in Capital Sentencing*, 29 Hofstra L. Rev. 1301, 1323 (2001).

Empirical jury research vindicates the concerns of the *Brown* dissenters. "Research on jurors' understanding of capital sentencing instructions indicates that there is a 'tilt toward death' in their interpretations of the instructions." *Death By Default*, at n. 228, citing Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 20 (1993) (hereinafter, "*Deadly Confusion*"). According to The Capital Jury Project, "[i]nterviewers found that jurors had profound misunderstandings of the law that tilted the balance toward death...Interviewers also found that jurors chose death simply to avoid a hung jury." Janet Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries and Discretion in*

Capital Cases, 46 B.C. L. Rev. 771, 791 (2005). Based upon this research, this Court should ensure Texas juries are no longer affirmatively misled to sentence defendants to death, as occurred in Mr. ShisInday's case.

A "fatal mistake" occurs where "a defendant is sentenced to death because the jury was misinformed...The justice system should be designed to prevent such a tragic error." *Deadly Confusion*, at 1. In the words of Justice Souter, "it is intolerable for the judicial system to treat people this way..." *Bowles v. Russell*, 127 S. Ct. 2360, 2367 (2007). The opportunity to confront this pernicious error, and save lives, is presented with Mr. ShisInday's Petition for *Certiorari*. Now is the time for this Court to ensure future Texas juries are no longer affirmatively misled when "confronted with the truly awesome responsibility of decreeing death for a fellow human." *McGautha v. California*, 402 U.S. 183, 207-208 (1971).

V. The ShisInday Jury Had the Right Not to be Misled Regarding the Consequences of a Deadlock

The instructions the jury is given should fully apprise the jury regarding how many votes it takes for a life sentence. The jury cannot be "affirmatively misled regarding its role in the sentencing process." *Jones v. U.S.*, 527 U.S. 373 (1999) citing *Romano*, 512 U.S. at 9. "The potential for coercion exists when a trial judge inquires as to the nature or extent of [the jury's] division and then instructs the jury to continue deliberating." *Coleman v. Quarterman*, 456

F. 3d 537, 548 (Tex. 2006) citing *Lowenfield v. Phelps*, 484 U.S. 231, 239-40 (1988). In *Jenkins v. U. S.*, 380 U.S. 445, 446 (1965), after two hours of deliberations the jury sent a note to the trial judge advising that it had been unable to agree upon a verdict "on both counts because of insufficient evidence." *Id.* The judge thereupon recalled the jury to the courtroom and stated "You have got to reach a decision in this case." This Court held this admonition was coercive and remanded the case for a new trial. *Id.*

However, in this case, the jurors who were deciding whether Mr. ShisInday should die were not properly informed as to how many votes were necessary for a life sentence. The jury instructions[2]

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[2] The special issues submitted pursuant to article 37.071 of the Texas Code of Criminal Procedure provided as follows:

Special Issue No. 1
Was the conduct of the defendant, Shozdijiji ShisInday also known as Danny Dean Thomas, that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Special Issue No. 2
Is there a probability that the defendant, Shozdijiji ShisInday also known as Danny Dean Thomas, would commit criminal acts of violence that would constitute a continuing threat to society?

Special Issue No. 3
Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a

mandated by TCCP Article 37.0711 led the ShisInday jurors to believe only two results were possible: either a unanimous vote for death or a vote of at least ten for life. Contrary to the jury instructions given, a sentence of life required only one vote. In *Prystash v. State*, 3 S.W.3d 522 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1102 (2000) a Texas court attempted to justify this injustice by reasoning,

> the appellant asserts that the refusal of the trial court to instruct the jury that a life sentence would be imposed if they failed to answer a special issue is reversible error. There is no constitutional prohibition to concealing from the jurors the consequences of their deliberations, so long as they are not misled into believing that ultimate responsibility for the verdict rests elsewhere. . . . The jury is not informed of the consequences of a hung jury, but each juror will know that without his or her vote the death sentence cannot be imposed.

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sentence of life imprisonment rather than a death sentence be imposed?

You are instructed that in answering this "Special Issue that you shall answer the Issue "Yes" or "No." You may not answer this Issue "No" unless you agree unanimously, and you may not answer this Issue "Yes" unless ten (10) or more of you agree to do so. You shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness. (App. C at C7-8).

Id. at 532. *Jurors For Justice* respectfully disagrees with *Prystash* and its progeny. The notion that jurors are capable of engaging in what is tantamount to the legal construction of Article 37.0711 and determine that the unanimity requirement for a death sentence prevails over the requirement of at least 10 votes for a life sentence, such that a single juror alone can insist on a sentence of life is directly contrary to this Court's holding in *Gregg* that jurors have "little, if any, previous experience in sentencing . . . [and] are unlikely to be skilled in dealing with the information they are given." 428 U.S. at 192. *See also Carter v. Kentucky*, 450 U.S. 288, 303 (1981) ("Jurors are not lawyers..."). *Prystash* and its progeny are based on the express intention that capital jurors be deceived into believing they have the either-or proposition of a unanimous verdict for death or at least 10 votes for a life sentence in order to predispose the jurors into voting for death. Jurors who are unskilled at dealing with information regarding sentencing will be far better served if they are instructed that a unanimous verdict is required for a death sentence, and in all other circumstances the sentence must be life. The fact TCCP Article 37.0711 does not utilize such simplicity and clarity, and instead opts for a deliberately confusing and disingenuous approach, proves the ulterior motive is to predispose the jurors in favor of a death sentence.

This is borne out by the record in this case. This jury was deadlocked on the issue of death for four days with three jurors holding out of life, two of

which stated they were "holding firm" and one juror indicating that he would hold out "for all eternity." (App. P at P2). In addition to that note, the judge also received notes indicating a 9-3 vote and that "continued deliberations are futile." (App. C at C26). Despite the holdouts, the trial judge continued to send back notes indicating the jury should continue deliberating.[3] After four days of deadlock, and no information or understanding that a life sentence could be imposed without any additional votes, the three hold-outs were coerced into siding with the majority in favor of death.

In matters of life and death, capital jurors should not be misled and biased in favor of voting for a death sentence. Texas law allows for capital jurors to be deceived in that they are not told that only a single vote is necessary for a life sentence, and the rationalization for this deception – that jurors are capable of engaging in *de facto* statutory construction and can decipher a facially ambiguous instruction – simply cannot be considered constitutionally valid. The members of *Jurors for Justice* have suffered this deception and must live with the knowledge that they could and would have spared defendants from death if they had only been told the truth.

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[3] The judge sent back two notes stating, "Please continue your deliberations." (App. C at C27-8).

CONCLUSION

For the foregoing reasons, *Jurors for Justice* requests that the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Dated: June 6, 2008

Respectfully Submitted,

Jurors for Justice

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